SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 756

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

THE P. KOENIG COAL COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

INDEX

1 In the United States District Court

Indictment. Summary of charges

COUNT ONE

Accepting concession in respect to the transportation of coal in car "C. & O. 60260," from Monitor Mine No. 2, at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of Samaritan Hospital, and diverted to Dodge Brothers.

COUNT TWO

Accepting concession in respect to the transportation of coal in car "C. & O. 15284," from Monitor Mine No. 2, at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of Samaritan Hospital, and diverted to Fisher Body Corporation.

COUNT THREE

Accepting concession in respect to the transportation of coal in car "C. & O. 61527," from Yuma Mine, at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of Samaritan Hospital, and diverted to Dodge Brothers.

COUNT FOUR

Accepting concession in respect to the transportation of coal in car "C. & O. 33198," from Yuma Mine, at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of Providence Hospital, and diverted to Dodge Brothers.

COUNT FIVE

Accepting concession in respect to the transportation of coal in car "S. T. T. X. 1197," from Yuma Mine at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT SIX

Accepting concession in respect to the transportation of coal in car "C. & O. 37907," from Yuma Mine, at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit, September 2, 1922, consigned in name of St. Mary's Hospital, and diverted to Fisher Body Corporation.

COUNT SEVEN

Accepting concession in respect to the transportation of coal in car "C. & O. 62788," from Monitor Mine No. 1, at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit August 30, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

2 COUNT EIGHT

Accepting concession in respect to the transportation of coal in car "C. & O. 13105," from Monitor Mine No. 2, at Logan, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT NINE

Accepting concession in respect to the transportation of coal in car "N. Y. C. 314045," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O. –C. C. C. & St. L.–D. & T. S. L.–G. T. railroads, arriving at Detroit September 6, 1922, consigned in name of St. Mary's Hosptial, and diverted to Dodge Brothers.

COUNT TEN

Accepting concession in respect to the transportation of coal in car "C. & O. 62739," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O.–C. C. C. & St. L.–D. & T. S. L.–G. T. railroads, arriving at Detroit September 6, 1922, consigned in name of St. Mary's Hosptial, and diverted to Dodge Brothers.

COUNT ELEVEN

Accepting concession in respect to the transportation of coal in car "C. & O. 58292," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O.–C. C. C. & St. L.–D. & T. S. L.–G. T. railroads, arriving at Detroit September 6, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT TWELVE

Accepting concession in respect to the transportation of coal in car "C. & O. 62977," from Lundale Mine, at Lundale, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT THIRTEEN

Accepting concession in respect to the transportation of coal in car "C. & O. 54948," from Lundale Mine, at Lundale, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT FOURTEEN

Accepting concession in respect to the transportation of coal in car "C. C. C. & St. L. 81349," from Dabney Mine, at Dabney, W. Va., by C. & O.–C. C. C. & St. L.–D. & T. S. L.–G. T. railroads, arriving at Detroit September 1, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

3 COUNT FIFTEEN

Accepting concession in respect to the transportation of coal in car "C. C. C. & St. L. 73494," from Dabney Mine, at Dabney, W. Va., by C. & O.–C. C. C. & St. L.–D. & T. S. L.–G. T. railroads, arriving at Detroit September 1, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT SIXTEEN

Accepting concession in respect to the transportation of coal in car "C. & O. 63900," from Lundale Mine, at Lundale, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit August 30, 1922, consigned in name of Detroit Creamery, and diverted to Dodge Brothers.

COUNT SEVENTEEN

Accepting concession in respect to the transportation of coal in car "Erie 31280," from Lundale Mine, at Lundale, W. Va., by C. & O.–D. T. & I.–Wabash–G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of Detroit Creamery, and diverted to Dodge Brothers.

COUNT EIGHTEEN

Accepting concession in respect to the transportation of coal in car "C. & O. 19447," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O.–C. C. C. & St. L.–M. C. R. R.–G. T. railroads, arriving at Detroit August 28, 1922, consigned in name of Towars Creamery, diverted to Fisher Body Corporation.

4 Violation of Act of Congress, approved February 19, 1903, as amended, (Elkins Act, 32 Stat. at L. 847, 34 Stat. at L. 584).

In United States District Court for the Eastern District of Michigan, Southern Division

Indictment

Filed November 22, 1923

FIRST COUNT

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Southern Division of the Eastern District of Michigan at the November term of said court in the year 1923, and inquiring for said division and district, upon their oath present,

1. That the Interstate Commerce Commission of the United States, on July 25, 1922, was of opinion that an emergency requiring immediate action then existed upon the lines of each and all common carriers by railroad subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto in that section of the United States lying east of the Mississippi River, and thereupon, under the authority of said act to regulate commerce and of said acts amendatory thereof and supplementary thereto, by its Service Order No. 23 of that date and on that day duly promulgated, suspended, in that section, from and after July 26, 1922, until the further order of said Interstate Commerce Commission, all of the rules, regulations and practices with respect to car service of common carriers by railroad subject to the provisions of said acts which conflicted with the directions in that order made; that, in and by said Service Order No. 23, is was provided that each of such common carriers, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give preference and priority to the movement of certain commodities, among which was coal, and that, in supplying cars to mines upon the lines of any such carrier as was a coal-loading carrier, that is to say, a carrier serving coal mines located upon its own lines, such carrier should place at, furnish with, and assign to, such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of classes indicated by their numbers, class 1 being for such purposes as might from time to time be specially designated by said Interstate Commerce Commission or its agents, and should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of hospitals, which were placed in class 2, over such placement and assignment of cars for the loading of coal required for the manufacturing of automobiles or automobile parts, which were then placed in class 5, but, afterwards, to wit, by amendment No. 4 to said Service Order No.

23, dated August 29, 1922, and effective August 30, 1922, in class 3; and, further, that coal shipped and consigned for the current use of hospitals should not be reconsigned or diverted for such
6 manufacturing purposes; that during the period of time extending from the day of such promulgating of said Service Order No. 23 to September 20, 1922, said Service Order No. 23 and said amendment remained in full force and effect; and that there was in fact during all of said period of time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of a certain coal-loading railroad common carrier in said section of the United States, to wit, of the Chesapeake and Ohio Railway Company, resulting from strikes and nonaction of employees of said common carrier whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its lines of railway, and, although said carrier then was able to place at, furnish with, and assign to, coal mines upon its lines cars suitable for the loading and transportation of a portion of the coal required for the current use of hospitals, and for the current use of other consumers of coal in the same class with hospitals, to wit, class 2, under said Service Order No. 23, to wit, seventy-eighth per cent. thereof, it then was unable to place at, furnish with, or assign to, coal mines upon its lines any suitable cars whatever for the loading and transportation of coal required for manufacturing automobiles or automobile parts, or any suitable cars whatever for class 3 or class 5 purposes, or for any purposes but class 1 and class 2 purposes.

7 2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, under the circumstances and conditions hereinabove set forth and described, during said period of time, to wit, on August 31, 1922, the P. Koenig Coal Company, a corporation under the laws of the State of Michigan, engaged, at the city of Detroit, in said Southern Division of said Eastern District of Michigan, in the business of a coal dealer, then and before then well knowing all the premises aforesaid, at said city of Detroit, in said Southern Division of said Eastern District of Michigan, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of certain property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from the Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order

No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

8 The P. Koenig Coal Company aforesaid, on August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereinafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on that day, from Detroit aforesaid, to the Monitor Coal and Coke Company, at Huntington, West Virginia, a telegraphic order for coal which purported to be an order for the shipment of five carloads of coal to the Samaritan Hospital, at said city of Detroit, in said Southern Division of said Eastern District of Michigan, in care of said The P. Koenig Coal Company, and to be delivered there to said The P. Koenig Coal Company upon its side track connecting with the line of said The Grand Trunk Railway Company of Canada, for the use of said samaritan Hospital, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its lines in West

9 Virginia, to wit, the railroad car bearing the initials "C. & O." and the serial number "60260," at Monitor No. 2 mine of said The Monitor Coal and Coke Company, at Logan, in West Virginia aforesaid, the loading of said car, on August 5, 1922, by said The Monitor Coal and Coke Company, with 96,700 pounds of run-of-mine bituminous coal, the tendering, by said The Monitor Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company, upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers than had any knowledge of said intentions of said The P. Koenig Coal Company.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for

securing said unlawful concession, immediately upon the receipt and acceptance by it of said coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was
10 so used by said concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Samaritan Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer whatever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and
11 deception, would not have granted to it, and, whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

12 SECOND COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the first count of this indictment mentioned, to wit, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said first count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were here repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive

a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there and all shippers desirous of shipping coal
13 embraced in said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railroad Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereinafter named the transportation of the coal in this count mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobile bodies, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on the day in said first count in that behalf aforesaid, from Detroit aforesaid, to said The Monitor Coal and Coke Company, the telegraphic order in said first count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at a certain coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "15284," at said Monitor No. 2 mine of said The Monitor Coal and Coke Com-
14 pany at Logan aforesaid, the loading of said last-mentioned car, on said August 5, 1922, by said The Monitor Coal and Coke Company, with 78,600 pounds of run-of-mine bituminous coal, the tendering, by said The Monitor Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street: which said delivery said The P. Koenig Coal Company then and there accepted; and

which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobile bodies, to wit, to the Fisher Body Corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Samaritan Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said The Fisher Body Corporation, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in the count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRD COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the first count of this indictment mentioned, to wit, on August 31, 1922, at Detroit aforesaid, in said Southern

Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said first count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were here repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there and all shippers desirous of
18 shipping coal embraced in said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count mentioned, in interstate commerce from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on the day in said first count in that behalf aforesaid, from Detroit aforesaid, to said The Monitor Coal and Coke Company, the telegraphic order in said first count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 7, 1922, at the request of said The Monitor Coal and Coke Company, and of the Yuma Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal,
19 at a certain coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "61527," at the Yuma mine of said Yuma Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 7, 1922, by said Yuma Coal and Coke Company, with 99,700 pounds of run-of-mine bituminous coal, the tendering, by said Yuma Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common car-

riers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company upon its Grand Trunk siding near Scott Street: which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in
the manufacture, at Detroit aforesaid, of automobiles and
20 automobile parts, to wit, to said Dodge Brothers, for its use
use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Samaritan Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby
21 an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

22 FOURTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the first count of this indictment mentioned, to wit, on August 31, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said first count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were herein repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all
23 other such coal dealers there and all shippers desirous of shipping coal embraced in said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say: The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count mentioned, in interstate commerce from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on said August 2, 1922, from Detroit aforesaid, to said The Monitor Coal and Coke Company, at Huntington, West Virginia, a telegraphic order which purported to be an order for the shipment of ten carloads of coal to the Providence Hospital, in said City of Detroit, in said Southern Division of said Eastern District of Michigan, in care of said
24 The P. Koenig Coal Company, and to be delivered there to said The P. Koenig Coal Company upon its side track connecting with the line of said The Grand Trunk Railway Company of Canada, for the use of said Providence Hospital, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Rail-

way Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company, and of said Yuma Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at a certain coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "33198," at the Yuma Mine of said Yuma Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 5, 1922, by said Yuma Coal and Coke Company, with 104,500 pounds of run-of-mine bituminous coal, the tendering, by said Yuma Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street: which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, the Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Providence Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in

interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

27 FIFTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the Interstate Commerce Commission of the United States, on July 25, 1922, was of opinion that an emergency requiring immediate action then existed upon the lines of each and all common carriers by railroad subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto in that section of the United States lying east of the Mississippi River, and thereupon, under the authority of said act to regulate commerce and of said acts amendatory thereof and supplementary thereto, by its Service Order No. 23 of that date and on that day duly promulgated, suspended, in that section, from and after July 26, 1922, until the further order of said Interstate Commerce Commission, all of the rules, regulations, and practices with respect to car service of common carriers by railroad subject to the provisions of said acts which conflicted with the directions in that order made; that in and by said Service Order No. 23, it was provided that each of such common carriers, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give preference and priority to the movement of certain commodities, among which was coal, and that, in supplying cars to mines upon the

28 lines of any such carrier as was a coal-loading carrier, that is to say, a carrier serving coal mines located upon its own lines, such carrier should place at, furnish with, and assign to, such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of classes indicated by their numbers, class 1 being for such purposes as might from time to time be specifically designated by said Interstate Commerce Commission or its agents, and should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of hospitals, which were placed in class 2, over such placement and assignment of cars for the loading of coal required for the manu-

facturing of automobiles or automobile parts, which were then placed in class 5, but, afterwards, to wit, by amendment No. 4 to said Service Order No. 23, dated August 29, 1922, and effective August 30, 1922, in class 3; and, further, that coal shipped and consigned for the current use of hospitals should not be re-consigned or diverted for such manufacturing purposes; that during the period of time extending from the day of such promulgating of said Service Order No. 23 to September 20, 1922, said Service Order No. 23 and its said amendment remained in full force and effect; and that there was in fact during all of said period of time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of a certain coal-loading railroad common carrier in said
29 section of the United States, to wit, of the Chesapeake and Ohio Railway Company, resulting from strikes and non-action of employees of said common carrier whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its lines of railway, and although said carrier then was able to place at, furnish with, and assign to, coal mines upon its lines cars suitable for the loading and transportation of a portion of the coal required for the current use of hospitals and for the current use of other consumers of coal in the same class with hospitals, to wit, class 2, under said Service Order No. 23, to wit, seventy-eight per cent thereof, it then was unable to place at, furnish with, or assign to, coal mines upon its lines any suitable cars whatever for the loading and transportation of coal required for manufacturing automobiles or automobile parts, or any suitable cars whatever for class 3 or class 5 purposes, or for any purposes but class 1 and class 2 purposes.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, under the circumstances and conditions hereinabove set forth and described, during said period of time, to wit, on August 31, 1922, said The P. Koenig Coal Company, a corporation under the laws of the State of Michigan, engaged at the city of Detroit, in said Southern Division of said Eastern District of
30 Michigan, in the business of a coal dealer, then and before then well knowing all the premises in this count of this indictment aforesaid, at said city of Detroit, in said Southern Division of said Eastern District of Michigan, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of certain property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from the Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company and the Grand Trunk Railway Company of Canada, whereby an advantage

was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced within said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter
31 named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern, by and through the device of sending on that day from Detroit aforesaid to the Monitor Coal and Coke Company, at Huntington, West Virginia, a telegraphic order for coal which purported to be an order for the shipment of ten carloads of coal to the St. Mary's Hospital at said city of Detroit, in said Southern Division of said Eastern District of Michigan, in care of said The P. Koenig Coal Company, and to be delivered there to said The P. Koenig Coal Company upon its side track connecting with the line of said Grand Trunk Railway Company of Canada, for the use of said St. Mary's Hospital, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company and of said Yuma Coal and Coke Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its lines in West Virginia, to wit, the railroad car bearing the initials "S. T. T. X.," and the serial number "1197," at the Yuma mine of said Yuma Coal and Coke Company, at Logan aforesaid, in West Virginia aforesaid, the loading of said car, on August 5, 1922, by said Yuma Coal and Coke Company, with 96,500 pounds of run-of-mine bituminous coal, the tendering, by said Yuma
32 Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company, upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said concern; and that at the several times of the sending by said The P. Koenig Coal Company of said last-mentioned telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company and of its said diversion and delivery to said
33 concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer whatever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

34 SIXTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the fifth count of this indictment mentioned, to wit, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said fifth count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were

herein repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor against all other such coal dealers there and all shippers of coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

35 The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid, well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation, in interstate commerce, of the coal in this count mentioned, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobile bodies, by and through the device of sending, on the day in said fifth count aforesaid, from Detroit aforesaid to said The Monitor Coal and Coke Company, the telegraphic order in said fifth count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 7, 1922, at the request of said The Monitor Coal and Coke Company and of the Yuma Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at said coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "37907," at said Yuma mine of said Yuma Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 7, 1922, by said Yuma Coal and Coke Company, with 113,900 pounds of run-of-mine bituminous coal, the tendering, by said

36 Yuma Coal and Coke Company to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof by said common carriers, from Logan aforesaid, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then

and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobile bodies, to wit, to the Fisher Body Corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of
37 its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said The Fisher Body Corporation, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

38 SEVENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the fifth count of this indictment mentioned, to wit, on August 30, 1922, at Detroit aforesaid, in said Southern Divi-

sion of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said fifth count, the allegations of which said paragraph in that behalf are incorporated in this court by reference as fully as if they were herein repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor against all other such coal dealers there and all shippers of coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company, that is to say:

39 The P. Koenig Coal Company aforesaid, on said August 2 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation, in interstate commerce, of the coal in this count mentioned, from West Virginia, into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts by and through the device of sending, on the day in said fifth count aforesaid, from Detroit aforesaid to said The Monitor Coal and Coke Company, the telegraphic order in said fifth count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 10, 1922, at the request of said The Monitor Coal and Coke Company, of a certain other car suitable for the loading and transportation of coal, at said coal loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "62788," at said Monitor mine No. 1 of said The Monitor Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 10, 1922, by said The Monitor Coal and Coke Company with 103,600 pounds of run-of-mine bituminous coal, the tendering by said The Monitor Coal and Coke Company, to said The Chesa peake and Ohio Railway Company, for transportation, of

40 said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof by said common carriers, from Logan aforesaid, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, i

accordance with said billing, and its delivery there, on said August 30, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said
41 concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

42 EIGHTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the fifth count of this indictment mentioned, to wit, on August 31, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said fifth count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were herein repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor against all other such coal dealers there and all shippers of coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

43 The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid, well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation, in interstate commerce, of the coal in this count mentioned, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, by and through the device of sending, on the day in said fifth count aforesaid, from Detroit aforesaid to said The Monitor Coal and Coke Company, the telegraphic order in said fifth count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 16, 1922, at the request of said The Monitor Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at said coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "13105," at said Monitor No. 2 mine of said The Monitor Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 16, 1922, by said The Monitor Coal and Coke Company, with 103,500 pounds of run-of-mine bituminous

coal, the tendering, by said The Monitor Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for
44 transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof by said common carriers, from Logan aforesaid, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern,
45 the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company, so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others;

against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

46 NINTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 6, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

47 The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 17,

1922, at the request of said Amherst Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials
48 "N. Y. C." and the serial number "314045", at Argyle Mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Argyle Coal Company with 85,300 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions which were given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine to said City of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 6, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for
49 securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

50

TENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 6, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

51

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it

the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Mich-
52 igan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "62739," at Argyle mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Argyle Coal Company with 104,300 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions which were given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Rail-
way Company, said The Detroit and Toledo Shore Line Rail-
53 road Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 6, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corpo-

ration, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the
54 purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

55 ELEVENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 6, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Detroit and Toledo Shore Line Railroad Company, and The Grand Trunk

Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

56 The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and

57 transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "58292," at Argyle mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Argyle Coal Company with 98,600 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions which were given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 6, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said City; which

said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge
58 of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit, aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carloads of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath afore-
59 said, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TWELFTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this

indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922,
61 then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "62977," at Lun-
dale mine, at Lundale, in West Virginia aforesaid, (2) the
62 loading of said car on August 17, 1922, by said Lundale Coal Company with 109,500 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of

said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid to said City of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for
63 securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said
64 carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The

P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and
65 said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it, the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in cars of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and

thereby induced, (1) the placing, furnishing and assigning by
66 said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "54948," at Lundale mine, at Lundale, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Lundale Coal Company with 101,600 pounds of bituminous run-or-mine coal, that being a carload, (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid, to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said
67 device then and there was a deceptive device because none of said carriers then had any knowledge of *of* said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive
68 a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 1, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain
69 other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the place-

ment of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into
70 said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at D troit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Thurmond Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. C. C. & St. L" and the serial number "81349," at Dabney mine, at Dabney, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Thurmond Coal Company with 110,900 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Thurmond Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Dabney aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said
71 The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Dabney to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 1, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automo

biles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance
72 by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

73 FIFTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 1, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company

of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, pur-
74 chased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of and to be delivered to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Thurmond Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. C. C. & St. L." and the serial number "73494," at Dabney mine, at Dabney, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Thurmond Coal Company with 102,900 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Thurmond Coal Company to said The Chesapeake and Ohio Railway
75 Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Dabney aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Dabney to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 1, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there ac-

cepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said
76 billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

77 SIXTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the Interstate Commerce Commission of the United States, on July 25, 1922, was of opinion that an emergency requiring immediate action then existed upon the lines of each and all common carriers by railroad subject to the act to regulate com-

merce and the acts amendatory thereof and supplementary thereto in that section of the United States lying east of the Mississippi River, and thereupon, under the authority of said act to regulate commerce and of said acts amendatory thereof and supplementary thereto, by its Service Order No. 23 of that date and on that day duly promulgated, suspended, in that section, from and after July 26, 1922, until the further order of said Interstate Commerce Commission, all of the rules, regulations and practices with respect to car service of common carriers by railroad subject to the provisions of said acts which conflicted with the directions in that order made; that, in and by said Service Order No. 23 it was provided that, each of such common carriers, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give preference and priority to the movement of certain commodities, among which was coal, and that, in supplying cars to mines upon the lines of each such carrier as was a coal-loading carrier, that is to say, a carrier serving coal mines located upon its own lines,
78 such carrier should place at, furnish with, and assign to, such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of classes indicated by their numbers, class 1 being for such purposes as might from time to time be specifically designated by said Interstate Commerce Commission or its agents, and should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of ice plants which supplied refrigeration for human foodstuffs and of manufacturers and producers of foodstuffs, which were placed in class 2, over such placement and assignment of cars for the loading of coal required for the manufacturing of automobiles or automobile parts, which were then placed in class 5, but, afterwards, to wit, by amendment No. 4 to said Service Order No. 23, dated August 29, 1922, and effective August 30, 1922, in class 3; and, further, that coal shipped and consigned for the current use of such ice plants and manufacturers and producers of foodstuffs should not be re-consigned or diverted for such automobile manufacturing purposes; that during the period of time extending from the day of such promulgating of said Service Order No. 23 to September 20, 1922, said Service Order No. 23 and its said amendment remained in full force and effect; and that there was in fact during all of said period of time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of a certain coal-loading railroad common carrier in said section of the
79 United States, to wit, of The Chesapeake and Ohio Railway Company, resulting from strikes and non-action of employees of said common carrier whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier

was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its lines of railway, and although said carrier then was able to place at, furnish with, and assign to, coal mines upon its lines cars suitable for the loading and transportation of a portion of the coal required for the uses in this count aforesaid, and for the current use of other consumers of coal in the same class with such ice plants and manufacturers and producers of foodstuffs, to wit, class 2, under said Service Order No. 23, to wit, seventy-eight per cent thereof, it then was unable to place at, furnish with, or assign to, coal mines upon its lines any suitable cars whatsoever for the loading and transportation of coal required for manufacturing automobiles or automobile parts, or any suitable cars whatsover for class 3 or class 5 purposes, or for any purposes but class 1 and class 2 purposes.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during said period of time, to wit, on August 30, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions in this count of this indictment above set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of
80 certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 5, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 40 car loads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koeonig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and
81 automobile parts, knowingly instructed said Amherst Fuel Company to tender said 40 carloads of coal for transporta-

tion billed and consigned to the Detroit Creamery, at Detroit aforesaid (it then being an ice plant which supplied refrigeration for human food stuffs and a manufacturer and producer of food stuffs), in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The *The* Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "63900," at Lundale mine, at Lundale, in West Virginia aforesaid, (2) the loading of said car on August 5, 1922, by said Lundale Coal Company with 114 600 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 5, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway
82 Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid, in West Virginia aforesaid, to said city of Detroit, in said Southern Division of said Eastern District of Michigan, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said August 30, 1922, to said The P. Ko nig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers th n had any knowledge of said intentions of said The P. Koenig Coal Company.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, in said division and district, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said carload of coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its
83 said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said con-

cern, the said Detroit Creamery, as said The P. Koenig Coal Company at all those times well knew, had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatsoever, for the use of any other consumer of coal or for the use of said Dodge Brothers.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

84 SEVENTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the sixteenth count of this indictment, which allegations of said sixteenth count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that it to say:

The P. Koenig Coal Company aforesaid, on August 7, 1922, then as aforesaid well knowing all the premises aforesaid, pur-
85 chased a large quantity, to wit, 50 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it, the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 50 carloads of coal for transportation billed and consigned to said Detroit Creamery, at Detroit aforesaid (it then and there being, as aforesaid, an ice plant which supplied refrigeration for human food stuffs and a manufacturer and producer of food stuffs), in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 7, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a cer-
86 tain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the name "Erie" and the serial number "31280," at Lundale mine, at Lundale, in West Virginia aforesaid, (2) the loading of said car on said August 7, 1922, by said Lundale Coal Company with 104,500 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 7, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid in West Virginia aforesaid, to said city of Detroit, in said division and district, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

87 2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, in said division and district, there diverted and delivered the same in said car to a concern engaged in the manufactuer, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said carload of coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Detroit Creamery, as said The P. Koenig Coal Company at all those times well knew, had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatsoever, for the use of any other consumer of coal or for the use of said Dodge Brothers.

88 3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

89 EIGHTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on August 28, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the sixteenth count of this indictment, which allegations of said sixteenth count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of

certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Michigan Central Railroad Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

90 The P. Koenig Coal Company aforesaid, on August 12, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 80 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it, the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobile bodies, knowingly instructed said Amherst Fuel Company to tender said 80 carloads of coal for transportation billed and consigned to the Towars Creamery, at Detroit aforesaid (it then and there being an ice plant which supplied refrigeration for human food stuffs and a manufacturer and producer of food stuffs and a branch of said Detroit Creamery), in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 12, 1922, at the request of said Amherst

91 Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "19447," at Argyle mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on said August 12, 1922, by said Argyle Coal Company with 82,600 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 12, 1922, by said The

P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Michigan Central Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Yolyn aforesaid, in West Virginia aforesaid, to said city of Detroit, in said division and district, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said August 28, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding at Seven Mile Road near said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company

92 2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, near Detroit aforesaid, in said division and district, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobile bodies, to wit, to the Fisher Body Corporation, for its use in such manufacture; and that at the several times of the said purchasing of said carload of coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, neither the said Towars Creamery nor said Detroit Creamery, as said The P. Koenig Coal Company at all those times well knew, had authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatsoever, for the use of any other consumer of coal or for the use of said Fisher Body Corporation.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in

93 interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The

P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

EARL J. DAVIS,
United States Attorney.

JOHN A. BAXTER,
Assistant United States Attorney,
Eastern District of Michigan.

A true bill.

CONRAD J. NETTING,
Foreman of Grand Jury.

[File indorsement omitted.]

94 In United States District Court

[Title omitted.]

Demurrer

Filed Feb. 25, 1924

Now comes the P. Koenig Coal Company, by Edwin R. Monnig and Harold Goodman, its attorneys, and having heard the said indictment read, says that the indictment in each and every count thereof, and the matters therein contained in manner and form, and as the same are above stated and set forth in respect to each and every count thereof, are not sufficient in law in the following respects:

1. The acts charged do not constitute the receipt on the part of the defendant of a concession given or a discrimination practiced by common carriers and such acts as charged are not defined by the laws of the United States as crimes.

2. The defendant was entitled at the times therein alleged to receive transportation without regard to the restrictions imposed by paragraph 7 of the Interstate Commerce Commission's Service Order No. 23, because paragraph 7 was beyond the power of the Interstate Commerce Commission to make in the following respects:

(a) It is the attempted exercise of purely legislative powers conferred upon the Congress of the United States by article 1, sections 1 and 8 of the Constitution of the United States, and the said powers could not be delegated to the Interstate Commerce Commission.

(b) Paragraph 7 of Service Order No. 23 exceeds the authority conferred upon the Interstate Commerce Commission.

(c) The Federal Government is without constitutional power to affect the use, consumption, price, and disposition of coal and
95 to exercise a local police power as attempted in said service order, because such powers are reserved to the several States.

(d) The order is so arbitrary and unreasonable that in the manner and form as made it is not within the powers of the National Government and of the Interstate Commerce Commission, and is an encroachment of the powers of the several States.

(e) The said service order violated the fifth amendment of the Constitution of the United States in that it deprives this defendant of liberty and of property without due process of law because it arbitrarily closes railway transportation for the use of this defendant thereby depriving him of his trade custom and profits, and it grants the privilege of transportation unto other and favored persons.

(f) It is invalid as in violation of section 9, article 1 of the Constitution of the United States in that it gives preference to the Lake Erie ports of Ohio and Pennsylvania over the ports of other States, in respect to the transportation and shipment of coal, and that it gives a preference to the Lake Superior ports of Michigan, Wisconsin, and Minnesota over the ports of other States with respect to the receipt of shipments of coal.

And that the said P. Koenig Coal Company is not bound by the law of the land to answer the same, and this it is ready to verify:

Wherefore, for want of sufficient indictment in this behalf, the said P. Koenig Coal Company prays judgment and that by the court it may be dismissed and discharged from the said premises in the said indictment specified.

EDWIN R. MONNIG,
HAROLD GOODMAN,
Attorneys for Defendant.

[File indorsement omitted.]

96 In United States District Court

[Title omitted.]

Hon. Delos G. Smith, of Detroit, United States attorney, and William H. Bonneville, Esq., of Washington, special assistant United States attorney, attorneys for plaintiff; Edwin R. Monnig, Esq., and Harold Goodman, Esq., both of Detroit, attorneys for defendant.

Opinion

Filed Sept. 22, 1924

TUTTLE, District Judge:

This cause is now before the court, on demurrer to an indictment, for the second time. On the previous hearing a demurrer to the indictment then pending was sustained for reasons pointed out in the written opinion of the court, as reported in 291 Federal 385. Thereafter, another indictment was returned against the defendant based upon the same transactions as were involved in the previous indictment, but framed in an effect to avoid the objections sustained

on the former hearing. A demurrer has again been filed, challenging the sufficiency of the present indictment on grounds not previously presented nor passed upon.

The indictment charges the defendant with having knowingly accepted certain illegal concessions in respect to the transportation of property in interstate commerce, in violation of section 1 of the so-called Elkins Act (act Feb. 19, 1903, c. 708, 32 Statutes at Large, 847) as amended by section 2 of the Hepburn Act (act June 29, 1906, c. 3591, 34 Statutes at Large, 587 — Comp. St. section 8597). The language of this section, as so amended, which is here involved is as follows:

97 "It shall be unlawful for any person * * * or corporation to * * * accept or receive any rebate, concession, or discrimination in respect to the transpor'ation of any property in interstate or foreign commerce by any common carrier * * * whereby any * * * advantage is given or discrimination is practiced. Every person or corporation * * * who shall knowingly * * * accept or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished" as provided in said section.

The concessions charged to have been accepted by the defendant are alleged to have resulted from the obtaining by it, from a certain common carrier, by means of deception, of a preference and priority forbidden by a certain order made by the Interstate Commerce Commission on July 25, 1922, known as Service Order No. 23. The material provisions of that order were as follows:

"It is ordered and directed: * * * That * * * common carriers by railroad are hereby authorized and directed whenever unable to supply all uses in full to furnish * * * coal mines with open top cars suitable for the loading and transportation of coal, in preference to any other use, supply, movement, distribution, exchange, interchange or return of such cars. * * *

"That in the supply of cars to mines * * * such carrier is hereby authorized and directed to place, furnish, and assign such coal mines with cars suitable for the loading and transportation of coal in succession as may be required for the following classes of purposes, and in following order of classes, namely:

"Class 1. For such special purposes as may from time to time be specially designated by the Commission or its agent therefor. And subject thereto:

"Class 2: * * * For * * * hospitals * * * all to the end that such * * * quasi public utilities * * * may be kept supplied with coal for current use for such purposes, but not for storage, exchange, or sale. And subject thereto: * * *

"Class 5. Other purposes. No coal embraced in classes 1, 2, * * * shall be subject to reconsignment or diversion except for some purpose in the same class or a superior class in the order of priority herein prescribed."

None of such preferred classes included manufacturers of automobiles.

The indictment contains eighteen counts, of which the first is typical of all. That count first alleges the making, by the Interstate Commerce Commission, of the service order in question, recites the terms of such order, and alleges the inability of common carriers to transport all freight traffic offered, and to place, furnish, and assign to coal mines cars for the transportation of coal required for manufacturing automobiles or automobile parts, although able to assign such cars for coal required for the current use of hos-
98 pitals. It is then alleged that while said order was in effect and applicable, the defendant, a corporation engaged in the business of a coal dealer, knowingly accepted a concession of the kind forbidden by the statute just cited, by means of the following transaction: That the defendant, intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for Dodge Brothers, a corporation engaged in the manufacture of automobiles at Detroit, in this district, the transportation of certain coal in interstate commerce from West Virginia into said district for the use of said Dodge Brothers in the manufacture of automobiles and to divert and deliver such coal to such manufacturer, through the device of sending to a certain named coal mining company in West Virginia a telegraphic order for certain coal purporting to be an order for the shipment of such coal to a certain named hospital at the city of Detroit in care of the defendant and to be delivered there to defendant on its side tracks, for the use of such hospital, induced the placing and assigning by a named common carrier railroad company, at the request of said mining company, of a described car at a particular mine in West Virginia and the loading and tendering of said car, by said mining company, to said railroad company for transportation, billed and consigned in accordance with said telegraphic order, by said carrier and its connecting carriers, to Detroit and its delivery there to the defendant on its said siding, which delivery the defendant accepted. It is then charged that "said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company"; that the defendant, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said coal there directed and delivered the same in said car to said Dodge Brothers for use in its manufacture of automobiles, which coal was so used by it; that during all of the aforesaid acts on the part of the defendant, the said hospital, as defendant well knew, did not need said coal and had not authorized or requested the defendant to use its name for the purpose of procuring coal for its own
99 use or for the use of any other consumer; and that, therefore,

the defendant, by the device referred to, knowingly accepted and received a concession in respect to the transportation of property in interstate commerce by a common carrier subject to the interstate commerce act, which concession was "obtained by deception practiced by it upon said carrier, whereby an advantage was given by those carriers to said The P. Koenig Coal Company, which by force of said Service Order No. 23 was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it, the said The P. Koenig Coal Company, and which the said common carrier, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided."

The first ground on which the demurrer of the defendant is based is that the acts so charged in the indictment do not constitute the acceptance or receipt by the defendant of a "concession" given by a common carrier, as forbidden by the statute thus relied on by the Government.

After close and careful consideration of the able and exhaustive briefs submitted by the parties, I have reached the conclusion that the contention of the defendant in this respect is correct and that for that reason alone the demurrer must be sustained.

It cannot be doubted that the conduct of which the defendant is here accused was, if indulged in, most reprehensible and deserving of severe condemnation. The sole question, however, with which this court is now concerned is whether such conduct constitutes the acceptance or receipt of a "concession" from a common carrier railroad, as denounced by the statute invoked by the Government.

It is an elementary rule of statutory construction that, in the absence of circumstances indicating otherwise, words, used by a legislative tribunal in the enactment of a statute are to be considered as having been so used according to their usual, ordinary meaning.

100 The common dictionary meaning of a "concession" (as illustrated by the definition in the Century and in Webster's International dictionaries) is "The act of conceding or yielding, usually implying a demand, claim, or a request," "a thing yielded," "a grant."

Now, nothing could be clearer than that, under the express allegations of the indictment involved, the advantage obtained is explicitly declared to have been received by the defendant from the carriers, not as a benefit yielded or consciously granted by them, but solely through and by means of deception pract'ed upon them by the defendant. The Government charges in substance that the carriers were tricked by the defendant into transporting this coal, which they would not have done "but for said device and deception." To say, under these alleged circumstances, that the carriers

thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion, to do violence to the plain meaning of language and to fail to call things by their proper names. If an advantage obtained by such artifice and fraud be a concession accepted or received by the deceiver from his victim (and, therefore, necessarily granted or given, even although unknowingly, by the deceived), then the hobo who steals a ride on the "bumpers" of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession "given" him, though not knowingly. I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same. Although I am aware that in the only reported decision, so far as I can learn, involving this precise question (that of the district judge in United States vs. Metropolitan Lumber Co., 254 Fed. 335), a contrary opinion was reached, I am unable, after careful study of that decision, to approve or accept the conclusions there expressed. I cannot avoid the conviction that they embody, and are based upon, the reasoning to which I have already referred and with which I cannot agree.

101 A careful reading of the Elkins Act leaves no doubt that its purpose was to punish and prevent the favoritism of shippers by common carriers in interstate commerce, and that, in order to more effectually accomplish this purpose Congress, after originally legislating against only the carriers, who granted such favoritism, extended its prohibitions so as to reach also the recipients of, and participants in, such favoritism, namely, the shippers who, by knowingly accepting or receiving such unfair favors, promoted and made them possible. In the language of the report of the Committee on Interstate Commerce in reporting the bill to the House (which report, of course, is entitled to consideration in the judicial construction of the statute), the committee believed that the Elkins Act, together with the interstate commerce law then existing, covered about all possible means "to prevent the granting of discriminations in favor of one shipper against another, or the building up of the one concern through the favoritism of railroad corporations."

Nor is it without significance, as bearing upon the meaning of this statute, that an entirely different statute (section 10 of the act of Feb. 4, 1887, ch. 104, 24 Stat. 382, as amended) expressly forbids the obtaining of various kinds of rebates by means of false statements, "whether with or without the consent or connivance of the carrier," being apparently intended by Congress to relate to an evil not also covered by any other statutory provision.

In view of the considerations mentioned, and bearing in mind that the penal statute involved should be construed strictly and

limited to the plain meaning of the language used, I reach the conclusion that it cannot properly be so extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar.

For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer.

ARTHUR J. TUTTLE,
District Judge.

DETROIT, MICH., *September 22, 1924.*

[File indorsement omitted.]

102 In United States District Court

Order sustaining demurrer

Sept. 22, 1924

[Title omitted.]

In this cause demurrer to the indictment herein having been heretofore duly argued and submitted, and the court having taken time for mature deliberation thereon, does now here order that said demurrer be, and the same is, hereby sustained, in accordance with the terms of the written opinion this day filed herein.

103 In United States District Court

[Title omitted.]

Assignment of errors

Filed Oct. 18, 1924

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for writ of error, files the following assignment of errors on which it will rely on its writ of error to the Supreme Court of the United States from the final judgment of the District Court entered September 22, 1924.

The District Court erred:

1. In sustaining the demurrer.
2. In not overruling the demurrer.
3. In not sustaining the indictment.
4. In holding and adjudging that the acts alleged in the indictment do not constitute the offense charged.

5. In holding and adjudging that the acts alleged in the indictment on which the defendant is charged with having knowingly accepted or received certain illegal concessions or discriminations in respect to the transportation of property in interstate commerce did not constitute a violation of section 1 of the Elkins Act (C. 708 32 Stat. 847) as amended by section 2 of the Hepburn Act (C. 3591, 34 Stat. 587).

6. In not holding and adjudging that the acts alleged in the indictment constitute on the part of the defendant the acceptance or receipt by the defendant of certain illegal concessions or discriminations within the meaning of section 1 of the Elkins Act (C 708, 32 Stat. 847) as amended by section 2 of the Hepburn Act (C 3591, 34 Stat. 587).

104 7. In deciding and holding as follows:

Now, nothing could be clearer than that, under the express allegations of the indictment involved, the advantage obtained is explicitly declared to have been received by the defendant from the carriers, not as a benefit yielded or consciously granted by them, solely through and by means of deception practiced upon them by the defendant. The Government charges in substance that the carriers were tricked by the defendant into transporting this coal, which they would not have done "but for said device and deception." To say under these alleged circumstances, that the carriers thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion to do violence to the plain meaning of language and to fail to call things by their proper names.

8. In deciding and holding as follows:

If an advantage obtained by such artifice and fraud be a concession accepted or received by the deceiver from its victim (and, therefore, necessarily granted or given, even though unknowingly, by the deceived), then the hobo who steals a ride on the "bumpers" of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the posket of a conductor on a train knowingly accepts and receives a concession "given" him, though not knowingly, I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same. Although I am aware that in the only reported decision, so far as I can learn, involving this precise question (that of the district judge in United States v. Metropolitan Lumber Co., 254 Fed. 335), a contrary opinion was reached, I am unable, after careful study of that decision, to approve or accept the conclusions there expressed. I cannot avoid the conviction that they embody, and are based upon, the reasoning to which I have already referred and with which I cannot agree.

9. In deciding and holding as follows:

Nor is it without significance, as bearing upon the meaning of this statute, that an entirely different statute (Section 10 of the Act of Feb. 4, 1887, ch. 104, 24 Stat. 382, as amended) expressly forbids the obtaining of various kinds of rebates by means of false statements, "whether with or without the consent or connivance of the carrier," being apparently intended by Congress to relate to an evil not also covered by any other statutory provision.

10. In deciding and holding as follows:

In view of the considerations mentioned, and bearing in mind that the penal statute involved should be construed strictly and limited to the plain meaning of the language used, I reach the conclusion that it cannot properly be so extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar.

105 11. In deciding and holding as follows:

For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer.

12. In entering the order sustaining the demurrer.

Wherefore, United States of America prays that the final judgment of the District Court entered September 22, 1924, sustaining the demurrer be reversed, annulled, and set aside, and for such other and further order as may be appropriate.

DELOS G. SMITH,
United States Attorney.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

[File indorsement omitted.]

106 In United States District Court

[Title omitted.]

Petition for writ of error

Filed Oct. 18, 1924

United States of America, plaintiff, by its counsel, now comes and says that on or about September 22, 1924, this court filed its opinion and entered its judgment in favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors on file.

Wherefore, United States of America prays that a writ of error may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a tran-

script of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States, in accordance with the provisions of the act of Congress approved March 2, 1907 (34 Stat. 1246).

DELOS G. SMITH,
United States Attorney.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

Approved:

CHARLES C. SIMONS,
United States District Judge.

[File indorsement omitted.]

107 In United States District Court

[Title omitted.]

Order allowing writ of error

Filed Oct. 18, 1924

United States of America, plaintiff, having by its counsel made and filed its petition praying a writ of error to the Supreme Court of the United States from the final judgment of the District Court entered September 22, 1924, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the writ of error be and the same is hereby allowed as prayed and made returnable within thirty (30) days from the date hereof and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said final judgment was made and entered to the Supreme Court of the United States.

CHARLES C. SIMONS,
United States District Judge.

[File indorsement omitted.]

108 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed Nov. 17, 1924

To the Clerk of the District Court:

Please transmit as the transcript of record in the above entitled cause, the following pleadings, documents and records to the Supreme Court of the United States:

1. Indictment.
2. Demurrer.

3. Opinion of the court.
4. Order on opinion sustaining demurrer.
5. Assignments of error.
6. Petition for writ of error.
7. Order allowing writ of error.

DELOS G. SMITH,
United States Attorney.

I hereby acknowledge service upon me of the above præcipe.
HAROLD GOODMAN,
Attorney for Appellee.

Dated this 16th day of November, 1924.
[File indorsement omitted.]

109 In United States District Court

[Title omitted.]

Writ of error

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before you, between United States of America, plaintiff, and The P. Koenig Coal Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the Su-
110 preme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-four.

[SEAL.] ELMER W. VOORHEIS,
Clerk of the District Court of the United States.

111 [Citation in usual form showing service on Ed. R. Monnic and Harold Goodman. Omitted in printing.]

112 In United States District Court

[Title omitted.]

Clerk's certificate

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

I, Elmer W. Voorheis, clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to writ of error, sued out by the United States of America in the above entitled cause; that it is a true copy of the records and proceedings designated to be included in my said return, as the same appears of record and on file in my office; that I have compared the foregoing record with the originals, and that it is a true and correct transcript therefrom, and of the whole of such designated records and proceedings in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this twenty sixth day of November, in the year of our Lord, one thousand nine hundred and twenty four, and of the Independence of the United States of America, the one hundred and forty ninth.

[SEAL.]

ELMER W. VOORHEIS,
Clerk, United States District Court,
Eastern District of Michigan.

(Indorsed on cover:) File No. 30,721. E. Michigan D. C. U. S. Term No. 756. The United States of America, plaintiff in error, vs. The P. Koenig Coal Company. Filed December 3rd, 1924. File No. 30,721.

○

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 757

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

MICHIGAN PORTLAND CEMENT COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

INDEX

1

Indictment

Summary of charges

Count one

Accepting concession in respect to the transportation of coal in car "L. & N. 28108" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 4, 1922, consigned in name of Municipal Light and Power Company, and diverted to Michigan Portland Cement Company.

Count two

Accepting concession in respect to the transportation of coal in car "C. & A. 22987" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, and diverted to Michigan Portland Cement Company.

Count three

Accepting concession in respect to the transportation of coal in car "L. & N. 62517" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, and diverted to Michigan Portland Cement Company.

Count four

Accepting concession in respect to the transportation of coal in car "L. & N. 64846" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, consigned in name of Municipal Light and Power Company, and diverted to Michigan Portland Cement Company.

Count five

Accepting concession in respect to the transportation of coal in car "L. & N. 32650" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich, September 2, 1922, and diverted to Michigan Portland Cement Company.

Count six

Accepting concession in respect to the transportation of coal in car "L. & N. 85046" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, and diverted to Michigan Portland Cement Company.

Count seven

Accepting concession in respect to the transportation of coal in car "L. & N. 86949" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, consigned in name of Municipal Light and Power Company, and diverted to Michigan Portland Cement Company.

2

Count eight

Accepting concession in respect to the transportation of coal in car "P. L. 870203" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, and diverted to Michigan Portland Cement Company.

Count nine

Accepting concession in respect to the transportation of coal in car "L. & N. 81624" from Coburn mine, at Coburn, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, and diverted to Michigan Portland Cement Company.

Count ten

Accepting concession respect to the transportation of coal in car "L. & N. 80720" from Merna mine, at Merna, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 4, 1922, consigned in name of Municipal Light and Power Company, and diverted to Michigan Portland Cement Company.

Count eleven

Accepting concession in respect to the transportation of coal in car "L. & N. 83465" from Merna mine, at Merna, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, and diverted to Michigan Central Cement Company.

Count twelve

Accepting concession in respect to the transportation of coal in car "L. & N. 82307" from Merna mine, at Merna, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., August 31, 1922, and diverted to Michigan Portland Cement Company.

Count thirteen

Accepting concession in respect to the transportation of coal in car "L. & N. 83039" from Merna mine, at Merna, Ky., by L. & N., C. C. C. & St. L., C. N., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 2, 1922, consigned in name of Municipal Light and Power Company, and diverted to Michigan Portland Cement Company.

Count fourteen

Accepting concession in respect to the transportation of coal in car "L. & N. 70674" from Storm King mine, at Storm King, Ky., by L. & N., C. C. C. & St. L., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 5, 1922, and diverted to Michigan Portland Cement Company.

Count fifteen

Accepting concession in respect to the transportation of coal in car "L. & N. 77395" from Storm King mine, at Storm King, Ky., by L. & N., C. C. C. & St. L., M. C. R. R. railroads, arriving at Four Mile Lake, Mich., September 5, 1922, and diverted to Michigan Portland Cement Company.

3 Violation of act of Congress, approved February 19, 1903, as amended, (Elkins Act, 32 Stat. at L. 847, 34 Stat. at L. 584)

In United States District Court for the Eastern District of Michigan, Southern Division

Indictment filed December 4, 1923

First count

Eastern District of Michigan, Southern Division, *ss:*

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Southern Division of the Eastern District of Michigan at the November term of said court in the year 1923, and inquiring for said division and district, upon their oath present.

1. That the Interstate Commerce Commission of the United States, on July 25, 1922, was of opinion that an emergency requiring immediate action then existed upon the lines of each and all common carriers by railroad subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto in that section of the United States lying east of the Mississippi River, and thereupon, under the authority of said act to regulate commerce and of said acts amendatory thereof and supplementary thereto, by

its service order No. 23 of that date and on that day duly promulgated, suspended, in that section, from and after July 26,
4 1922, until the further order of said Interstate Commerce Commission, all of the rules, regulations, and practices with respect to car service of such common carriers which conflicted with the directions in that order made; that, in and by said service order No. 23, it was provided that each of such common carriers, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give preference and priority to the movement of certain commodities, among which was coal, and that in supplying cars to mines upon the lines of any such carrier as was a coal-loading carrier, that is to say, a carrier serving coal mines located upon its own lines, such carrier should place at, furnish with, and assign to such coal mines cars suitable for the loading and transportation of coal in succession as might be required for certain classes of purposes, and, in the order of classes indicated by their numbers, class 1 being for such purposes as might from time to time be specifically designated by said Interstate Commerce Commission or its agents, to wit, first, in order of priority, coal required for class 1 purposes; second, in order of priority, coal required for class 2 purposes, which included, among other things, coal required for the current fuel use of railroads and other common carriers, and for the current use of public utilities which directly served the general public, under a franchise therefor, with street and interurban railways, electric power and light, gas, water and sewer works; then coal required for purposes in certain classes in-
5 ferior in order of priority, to the purposes in said class 2, more particularly, class 5, which throughout the period from July 26, 1922, to August 29, 1922, inclusive, among other things, included coal required for the purpose of manufacturing Portland cement, and class 3, which throughout the period from August 30, 1922, to September 20, 1922, inclusive, included coal required for the purpose of manufacturing Portland cement; that coal consigned for a purpose in class 2 should not be reconsigned or diverted except for some other purpose in class 2, or for a purpose in class 1; that during the period of time extending from July 26, 1922, to September 20, 1922, said service order No. 23 remained in full force and effect; and that there was in fact during all the said period of time from August 7, 1922, to said September 20, 1922, both inclusive, such a shortage of equipment, particularly of serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of a certain coal-loading railroad common carrier in said section of the United States, to wit, the Louisville and Nashville Railroad Company, resulting from strikes and non-action of employees of said common carrier, whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier was currently unable promptly to trans-

port all freight traffic offered to it for movement, or to be moved over its lines of railway, and, although said carrier then was able to
6 place, furnish, and assign to coal mines upon its lines cars suitable for the loading and transportation of a portion of the coal required for class 1 and class 2 purposes, as defined in said order, to wit, fifty per cent, thereof, because of said shortage of equipment and said congestion of traffic it then was unable to place, furnish, and assign to coal mines upon its lines any suitable cars whatever for the loading and transportation of coal, required for purposes in class 3, class 4, or class 5, as defined in said order.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that throughout said period of time from August 7, 1922, to September 20, 1922, both inclusive, the Michigan Portland Cement Company, a corporation under the laws of the State of Michigan, was engaged in the manufacture, in said division of said district, of Portland cement, and customarily accepted delivery of carload shipments consigned to it when they were rendered for delivery to it by a certain common carrier by railroad in said section of the United States, to wit, The Michigan Central Railroad Company, at and upon certain railway tracks, herein called the private siding, owned by said Michigan Portland Cement Company, which connected with the railway line of said The Michigan Central Railroad Company, both said private siding and connection being at a certain point, to wit, "Four Mile Lake," in the County of Washtenaw, in said division and district.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that during said last-mentioned period of time, to wit, on August 11, 1922, the Wilson-Berger Coal Company, Inc.,
7 requested said Louisville and Nashville Railroad Company to place, furnish and assign 29 cars, suitable for the loading and transportation of coal, to a certain mine in the State of Kentucky, which was served by, and was located upon the line of, said Louisville and Nashville Railroad Company, to wit, "Coburn mine," at Coburn, in the State of Kentucky, for the loading and transportation of coal for class 2 purposes; that on said August 11, 1922, pursuant to said order given by the Wilson-Berger Coal Company, Inc., said Louisville and Nashville Railroad Company placed at, furnished with, and assigned to said mine a number of railroad cars suitable for the loading and transportation of coal, including the nine cars bearing the initials and numbers as stated below in this paragraph; that on August 11, 1922, at said Coburn Mine, said The Wilson-Berger Coal Company, Inc., loaded a carload of bituminous coal into and upon each of said nine cars, the initials and number of

said nine cars, and the kinds and weights of the coal so loaded therein being as follows, to wit:

Car initials	Car numbers	Kind of coal	Weight of lading in pounds
L. & N	28108	Lump	81,600
C. & A	22987	Run-of-mine	87,400
L. & N	62517	Lump	78,800
L. & N	64846	Lump	81,400
L. & N	32650	Lump	100,700
L. & N	85046	Run-of-mine	106,500
L. & N	86949	Run-of-mine	106,500
P. L	870203	Run-of-mine	90,300
L. & N	81624	Run-of-mine	101,700

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, under the circumstances and conditions hereinabove set forth and described, during said last-mentioned
8 period of time, to wit, on September 4, 1922, said Michigan Portland Cement Company, then and before then well knowing the premises aforesaid, at said Four Mile Lake, in said southern division of said eastern district of Michigan, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of certain of said property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of the aforesaid service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "28108," from the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922, then
9 intending by a device to procure class 2 preference and priority in the placement and assignment of cars suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count here-

after mentioned in interstate commerce, from Kentucky into said Southern Division of said Eastern District of Michigan, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car numbered "28108" to the Municipal Light and Power Company, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was so billed by said Louisville and Nashville Railroad Company and was transported in said car, numbered "28108," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said
10 Coburn mine, to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September 4, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, numbered "28108," to said Michigan Portland Cement Company on said private siding at said Four Mile Lake; instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there knowingly accepted; and which said last-mentioned carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

11 6. And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Michigan Portland Cement Com-

pany, at the time and place, in manner and form, and by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which, by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device, and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

12 Second count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in paragraphs 1, 2, and 3 of the first count of this indictment, all of the allegations made in said paragraphs being hereby incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

13 On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "22987," from The Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922,

then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count hereafter mentioned, from Kentucky into said Southern Division of said Eastern District of Michigan, in interstate commerce, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company, and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "22987" to the Municipal Light and
14 Power Company, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was so billed by said Louisville and Nashville Railroad Company, and was transported in said car, bearing the number "22987," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said the Michigan Central Railroad Company, common carriers by railroad in said section, from said Coburn mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, numbered "22987," to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake, instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by said
15 Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and

had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

3. And so the grand jurors aforesaid, upon their oath, aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

16 Third count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that during said last-mentioned period of time, to wit, on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in paragraphs 1, 2, and 3 of the first count of this indictment, all of the allegations made in said paragraphs being hereby incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23, from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Com-
17 pany, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "62517," from

the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count hereafter mentioned, from Kentucky into said Southern Division of said Eastern District of Michigan, in interstate commerce, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company, and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "62517" to the Municipal Light and Power Company, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was so billed by said Louis-

18 ville and Nashville Railroad Company and was transported in said car, bearing the number "62517," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Coburn mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, numbered "62517," to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake, instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel

19 Company of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said un-

[illegible] Coal Company, a duly organized corporation having an office in Cincinnati, in the State of Ohio, and on August 28, 1902, the [illegible] a decree to procure the [illegible] priorities in the payment and assignment of cars suitable [illegible] for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the output of coal in this court hereafter mentioned, from Kentucky into said Southern Division of said Eastern District of Michigan, in interstate commerce, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bowley-Dare Coal Company and said The Central Coal Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivers," pursuant to which instruction said Bowley-Dare Coal Company, said The Central Coal Company, and said The Wilson Horne Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "[illegible]" to the Municipal Light and Power Company, at Four Mile Lake, Michigan Central Railroad delivers, which thereupon, by reason of said instruction, was so billed by said Louisville and Nashville Railroad Company and was transported in said car, bearing the number "[illegible]," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers, by railroad in said section, from said Coleman mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September [illegible], 1902, pursuant to said instruction and billing, and further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car numbered "[illegible]" to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake, instead of to the electric light and power plant owned and operated by the municipality aforesaid, near said Four Mile Lake; that said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and that said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that at the several times of the giving by said Michigan Portland Cement Company of said [illegible] instructions to said Bowley-Dare Coal Company and said The Central Coal Company, of the acceptance of delivery of said carload of coal, and of the using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said

Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which, by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device, and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

24

Fifth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Sement Company, then and there well knowing the premises set forth in paragraphs 1, 2 and 3 of the first count of this indictment, all of the allegations made in said paragraphs being hereby incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company, and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

25 On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "32650," from the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference, and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count hereafter mentioned, from Kentucky into said Southern Division of said Eastern District of Michigan, in interstate commerce, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "32650" to the Municipal Light and

26 Power Company, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was so billed by said Louisville and Nashville Railroad Company and was transported in said car, bearing the number "32650," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Coburn mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, numbered "32650," to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake, instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

2. And the grand jurors aforesaid, upon their oath afore-
27 said, do further present, that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

28 Sixth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that during said last-mentioned period of time, to wit, on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in paragraphs 1, 2 and 3 of the first count of this indictment, all of the allegations made in said paragraphs being hereby incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said

Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23, from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Com-
29 pany, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "85046," from the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count hereafter mentioned, from Kentucky into said Southern Division of said Eastern District of Michigan, in interstate commerce, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "85046" to the Municipal Light and Power Company, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was

so billed by said Louisville and Nashville Railroad Company
30 and was transported in said car, bearing the number "85046," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Coburn mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, numbered "85046," to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake, instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal

said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal,
31 and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

32 Seventh count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in paragraphs 1, 2 and 3 of the first count of this indictment, all of the allegations made in said paragraphs being hereby incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St.

Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

33 On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "86949," from the Central Fuel Company, a duly organized corporation having an office in Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count hereafter mentioned, from Kentucky into said Southern Division of said Eastern District of Michigan, in interstate commerce, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company, and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "86949" to the Municipal Light and

34 Power Power Company, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was so billed by said Louisville and Nashville Railroad Company and was transported in said car, bearing the number "86949," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Coburn mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, numbered "86949," to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake, instead of to

the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by
35 said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

36 Eighth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present that during said last-mentioned period of time, to wit, on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in paragraphs 1, 2, and 3 of the first count of this indictment, all of the allegations made in said paragraphs being hereby incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States

lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its classs desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

37 On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "870203," from the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count hereafter mentioned from Kentucky into said Southern Division of said Eastern District of Michigan in interstate commerce for the use of said Michigan Portland Cenment Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company, and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "870203" to the Municipal Light and Power Company, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was so billed by said Louisville and Nashville Railroad Company and was

38 transported in said car bearing the number "870203" by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Coburn mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon

said private siding, said carload of coal was delivered in said car numbered "870203" to said Michigan Portland Cement Company, on said private siding at said Four Mile Lake, instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake, which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted, and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company of its acceptance of delivery of said carload of coal, and
39 of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given by those carriers to said Michigan Portland Cement Company which, by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device, and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

40 Ninth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present that on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in paragraphs 1, 2, and 3 of the first count of this indictment, all of the allegations made in said paragraphs being hereby incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain

other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

41 On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said car bearing the number "81624," from the Central Fuel Company, a duly organized corporation having an office in Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count hereafter mentioned, from Kentucky into said Southern Division of said Eastern District of Michigan, in interstate commerce, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," pursuant to which instructions said Bewley-Darst Coal Company, said The Central Fuel Company and said The Wilson-Berger Coal Company, Inc., instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car bearing the number "81624," to the Municipal Light and Power Com-

42 pany, at Four Mile Lake, Michigan Central Railroad delivery, which thereupon, by reason of said instructions, was so billed by said Louisville and Nashville Railroad Company and was transported in said car, bearing the number "81624," by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Coburn mine to said Four Mile Lake, over the respective connecting railway routes of said carriers; and, on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan

Portland Cement Company upon said private siding, said carload of coal was delivered in said car, numbered "81624," to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake, instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Company thereupon used for the purpose of manufacturing Portland cement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by said
43 Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which by force of said service order No. 23 was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

44 Tenth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, during the period of time in which said service order No. 23 was in force and effect, as alleged in the first count of this indictment, all of the allegations made in paragraphs 1 and 2 of said first count being hereby incorporated in this count by reference as fully as if they were here repeated, and during said period of time from August 7, 1922, to September 20, 1922, both inclusive, to wit, on August 11, 1922, the Mary Helen Coal Corporation requested said Louisville and Nashville Railroad Company to place,

furnish, and assign 34 cars suitable for the loading and transportation of coal to a certain mine in the State of Kentucky, which was served by, and was located upon the line of said Louisville and Nashville Railroad Company, to wit, "Merna mine," at Merna, in the State of Kentucky, for the loading and transportation of coal for class 2 purposes; that, on said August 11, 1922, pursuant to said order given by said Mary Helen Coal Corporation, said Louisville and Nashville Railroad Company placed at, furnished with, and assigned to said mine a certain railroad car, suitable for the loading and transportation of coal, to wit, the car bearing the initials "L. & N." and the number "80720"; and that, on said August 11, 1922, at said Merna mine said Mary Helen Coal Corporation loaded 97,500 pounds of bituminous 4-inch run-of-mine coal, that being a carload, into and upon said car.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, on September 4, 1922, at Four Mile Lake
45 aforesaid, in said southern division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in the first count of this indictment, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of said coal and property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said last-mentioned car, from the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and
46 transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count mentioned, in interstate commerce, from Kentucky into said Southern Division of said Eastern District of Michigan, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement,

Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from
50 mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said last-mentioned car, from the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count mentioned, in interstate commerce, from Kentucky into said Southern Division of said Eastern District of Michigan, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," and pursuant to said instructions, said Bewley-Darst Coal Company, said The Central Fuel Company and said Mary Helen Coal Corporation instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car to the Municipal Light and Power Company, at said Four Mile Lake, Michigan Central Railroad delivery, and thereupon, by reason of said instructions, said carload of coal was so billed by said Louisville and Nashville
51 Railroad Company, and was transported, in said car, by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Merna mine, to said Four Mile Lake, over their respective connecting railway routes, and on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake instead of to the electric light and power plant owned and operated

by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not
52 authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which, by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device, and deception would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Twelfth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, during the period of time in which said service order No. 23 was in force and effect, as alleged in the first count of this indictment, all of the allegations made in paragraphs 1 and 2 of said first count being hereby incorporated in this
53 count by reference as fully as if they were here repeated, and during said period of time from August 7, 1922, to September 20, 1922, both inclusive, to wit, on August 11, 1922, the Mary Helen Coal Corporation requested said Louisville and Nashville Railroad Company to place, furnish, and assign 34 cars suitable for the loading and transportation of coal to a certain mine in the State of Kentucky, which was served by, and was located upon the line of said Louisville and Nashville Railroad Company, to wit, "Merna

mine," at Merna, in the State of Kentucky, for the loading and transportation of coal for class 2 purposes; that, on said August 11, 1922, pursuant to said order given by said Mary Helen Coal Corporation, said Louisville and Nashville Railroad Company placed at, furnished with, and assigned to said mine a certain railroad car, suitable for the loading and transportation of coal, to wit, the car bearing the initials "L. & N." and the number "82307"; and that, on said August 11, 1922, at said Merna mine said Mary Helen Coal Corporation loaded 101,700 pounds of bituminous 4-inch run-of-mine coal, that being a carload, into and upon said car.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present that on August 31, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in the first count of this indictment, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of said coal and prop-
54 erty in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said last-mentioned car, from The Central Fuel Company, a duly organized corporation having an office in Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count mentioned, in interstate commerce, from Kentucky into said Southern Division of said Eastern District of
Michigan, for the use of said Michigan Portland Cement
55 Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," and, pursuant to said instructions, said Bewley-Darst Coal Company, said

The Central Fuel Company, and said Mary Helen Coal Corporation instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car to the Municipal Light and Power Company at said Four Mile Lake, Michigan Central Railroad delivery, and thereupon, by reason of said instructions, said carload of coal was so billed by said Louisville and Nashville Railroad Company, and was transported in said car by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Merna mine, to said Four Mile Lake, over their respective connecting railway routes, and on August 31, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

56

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which, by force of said service order No. 23, was

57 not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Thirteenth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, during the period of time in which said service order No. 23 was in force and effect, as alleged in the first count of this indictment, all of the allegations made in paragraphs 1 and 2 of said first count being hereby incorporated in this count by reference as fully as if they were here repeated, and during said period of time from August 7, 1922, to September 20, 1922, both inclusive, to wit, on August 11, 1922, the Mary Helen Coal Corporation requested said Louisville and Nashville Railroad Company to place, furnish, and assign 34 cars suitable for the loading and transportation of coal to a certain mine in the State of Kentucky, which was served by and was located upon the line of said Louisville and Nashville Railroad Company, to wit, "Merna mine," at Merna, in the State of Kentucky, for the loading and transportation of coal for class 2 purposes; that, on said August 11, 1922, pursuant to said order given by said Mary Helen Coal Corporation, said Louisville and Nashville Railroad Company placed at, furnished with,
58 and assigned to said mine a certain railroad car, suitable for the loading and transportation of coal, to wit, the car bearing the initials "L. & N." and the number "83039"; and that, on said August 11, 1922, at said Merna mine said Mary Helen Coal Corporation loaded 104,800 pounds of bituminous 4-inch run-of-mine coal, that being a carload, into and upon said car.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, on September 2, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in the first count of this indictment, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of said coal and property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and

a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon
59 the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Company, with the assistance of the Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in and upon said last-mentioned car, from The Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count mentioned, in interstate commerce, from Kentucky into said Southern Division of said Eastern District of Michigan, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said Bewley-Darst Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the "Municipal Light and Power Company, Four Mile Lake, Michigan Central Railroad delivery," and, pursuant to said instructions, said Bewley-Darst Coal Company, said The Central Fuel Company and said Mary Helen Coal Corporation instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car to the Municipal Light and Power Company, at said Four Mile Lake, Michigan Central Railroad delivery, and thereupon, by reason of said instructions, said carload
60 of coal was so billed by said Louisville and Nashville Railroad Company, and was transported, in said car, by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railroad Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Merna mine, to said Four Mile Lake, over their respective connecting railway routes, and on September 2, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said Bewley-Darst Coal Company and said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said
61 Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, abtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which, by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

62 **Fourteenth count**

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, during the period of time in which said service order No. 23 was in force and effect, as alleged in the first count of this indictment, all of the allegations made in paragraphs 1 and 2 of said first count being hereby incorporated in this count by reference as fully as if they were here repeated, and during said period of time from August 7, 1922, to September 20, 1922, both inclusive, to wit, on August 25, 1922, The Sloat-Darragh Coal Company requested said Louisville and Nashville Railroad Company to place, furnish and assign 10 cars suitable for the loading and transportation of coal to a certain mine in the State of Kentucky, which was served by, and was located upon the line of said Louisville and Nashville Railroad Company, to wit, "Storm King mine," at Storm King, in the State of Kentucky, for the loading and transportation of coal for class 2 purposes; that, on said August 25, 1922, pursuant to said order given by said The Sloat-Darragh Coal Company, said Louisville and Nashville Railroad Company placed at, furnished with, and assigned to said mine a certain railroad car, suitable for

the loading and transportation of coal, to wit, the car bearing the initials "L. & N." and the number "70674"; and that on said August 25, 1922, at said Storm King mine said The Sloat-Darragh Coal Company loaded 81,100 pounds of bituminous run-of-mine coal, that being a carload, into and upon said car.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, on September 5, 1922, at Four Mile Lake
63 aforesaid, in said Southern Division of said Eastern District of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in the first count of this indictment, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of said coal and property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and said The Michigan Central Railroad Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Company purchased a large quantity of coal, including the coal which was loaded in and upon said last-mentioned car, from the Central Fuel Company, a duly organized corporation having an office at Cincinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars, suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the
64 transportation of the carload of coal in this count mentioned, in interstate commerce, from Kentucky into said Southern Division of said Eastern District of Michigan, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said The Sloat-Darragh Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the City Electric Light and Power Company, at Chelsea, Michigan, for delivery by said The Michigan Central Railroad Company at said Four Mile Lake, and pursuant to said instructions, said The Central Fuel Company and said The Sloat-Darragh Coal Company instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car to the City Electric Light and Power Company, at Chelsea, Michigan, for delivery at said Four Mile Lake, by said The Michigan Central Railroad Company, and thereupon,

by reason of said instructions, said carload of coal was so billed by said Louisville and Nashville Railroad Company, and was transported, in said car, by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Storm King mine to said Four Mile Lake, over their respective connecting railway routes, and on September 5, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan
65 Portland Cement Company upon said private siding, said carload of coal was delivered in said car to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well knew, said municipality of Chelsea did not need or require said carload of coal and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and
66 the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which, by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device, and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Fifteenth count

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, during the period of time in which said service order No. 23 was in force and effect, as alleged in the first count of this indictment, all of the allegations made in paragraphs 1 and 2 of said first count being hereby incorporated in this count by reference as fully as if they were here repeated, and during said period of time from August 7, 1922, to September 20, 1922, both inclusive, to wit, on August 25, 1922, the Sloat-Darragh Coal Company requested said Louisville and Nashville Railroad Company to place, furnish, and assign 10 cars suitable for the loading and transportation of coal to a certain mine in the State of Kentucky, which
67 was served by and was located upon the line of said Louisville and Nashville Railroad Company, to wit, "Storm King mine," at Storm King, in the State of Kentucky, for the loading and transportation of coal for class 2 purposes; that, on said August 25, 1922, pursuant to said order given by said The Sloat-Darragh Coal Company, said Louisville and Nashville Railroad Company placed at, furnished with, and assigned to said mine a certain railroad car, suitable for the loading and transportation of coal, to wit, the car bearing the initials "L. & N." and the number "77395"; and that on said August 25, 1922, at said Storm King mine said The Sloat-Darragh Coal Company loaded 98,000 pounds of bituminous run-of-mine coal, that being a carload, into and upon said car.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, on September 5, 1922, at Four Mile Lake aforesaid, in said Southern Division of said Eastern Division of Michigan, said Michigan Portland Cement Company, then and there well knowing the premises set forth in the first count of this indictment, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of said coal and property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and said The Michigan Central Railroad
68 Company, whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in classes 3 and 5 of said service order No. 23 from mines located upon the lines of and served by said Louisville and Nashville Railroad Company; that is to say:

On August 23, 1922, said Michigan Portland Cement Company purchased a large quantity of coal, including the coal which was loaded in and upon said last-mentioned car, from the Central Fuel Company, a duly organized corporation having an office at Cin-

cinnati, in the State of Ohio, and, on August 23, 1922, then intending by a device to procure class 2 preference and priority in the placement and assignment of cars suitable, as aforesaid, for the loading and transportation of coal to be used for the purpose of manufacturing Portland cement, and intending to procure the transportation of the carload of coal in this count mentioned, in interstate commerce, from Kentucky into said Southern Division of said Eastern District of Michigan, for the use of said Michigan Portland Cement Company in the manufacture of Portland cement, knowingly directed said The Sloat-Darragh Coal Company and said The Central Fuel Company to tender all of such coal for transportation, billed and consigned to the City Electric Light and Power Company, at Chelsea, Michigan, for delivery by said The Michigan Central Railroad Company at said Four Mile Lake, and pursuant to

69 said instructions, said The Central Fuel Company and said The Sloat-Darragh Coal Company instructed said Louisville and Nashville Railroad Company to bill and transport said carload of coal in said car to the City Electric Light and Power Company, at Chelsea, Michigan, for delivery at said Four Mile Lake, by said The Michigan Central Railroad Company, and thereupon, by reason of said instructions, said carload of coal was so billed by said Louisville and Nashville Railroad Company, and was transported, in said car, by said Louisville and Nashville Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and said The Michigan Central Railroad Company, common carriers by railroad in said section, from said Storm King mine, to said Four Mile Lake, over their respective connecting railway routes, and on September 5, 1922, pursuant to said instructions and billing and a further instruction given by said Michigan Portland Cement Company to said The Michigan Central Railroad Company that said carload of coal be delivered to said Michigan Portland Cement Company upon said private siding, said carload of coal was delivered in said car, to said Michigan Portland Cement Company, on said private siding, at said Four Mile Lake instead of to the electric light and power plant owned and operated by the municipality of Chelsea, near said Four Mile Lake; which said delivery of said carload of coal said Michigan Portland Cement Company then and there accepted; and which said carload of coal said Michigan Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

70 3. And the grand jurors aforesaid, upon their oath aforesaid, do further present that at the several times of the giving by said Michigan Portland Cement Company of said shipping instructions to said The Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using of said carload of coal for the purpose of manufacturing Portland cement, as in this count aforesaid, as said Michigan Portland Cement Company then well

knew, said municipality of Chelsea did not need or require said carload of coal, and had not authorized or requested said Michigan Portland Cement Company to procure or provide any coal for it whatsoever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Michigan Portland Cement Company, at the time and place, in manner and form, and by the device and means, aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers, subject to the act to regulate commerce, and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said Michigan Portland Cement Company, which, by force of said service order No. 23, was not then, as said Michigan Portland Cement Company then and there well

71 knew, due or open to said Michigan Portland Cement Company, and which said common carriers, but for said deceptive billing, device, and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

EARL J. DAVIS,
United States Attorney.
JOHN A. BAXTER,
Assistant United States Attorney,
Eastern District of Michigan.

A true bill:
CONRAD J. NETTING,
Foreman of Grand Jury.
[File indorsement omitted.]

72 In United States District Court

Plea of not guilty

February 18, 1924

[Title omitted.]

The defendant Michigan Portland Cement Company, by its president, Nathan S. Potter, jr., being present in court and being arraigned on the indictment heretofore filed against it, waives the reading thereof and stands mute, and thereupon a plea of not guilty is entered herein as to said defendant under direction of the court.

73 In United States District Court

Order granting leave to file demurrer

February 18, 1924

[Title omitted.]

In this cause, upon the application of attorney for defendant, for cause shown, it is by the court now here ordered that leave be, and the same is, hereby granted to file demurrer by March 17th, A. D. 1924.

74 In United States District Court

[Title omitted.]

Demurrer

Filed March 4, 1924

Now comes the Michigan Portland Cement Company, by Beaumont, Smith and Harris, its attorneys, and having heard the said indictment read, says that it and the matters and things therein contained in manner and form as the same are stated and set forth are not sufficient in law in the following respects:

(1) Said matters and things as charged in said indictment do not constitute a concession, discrimination or other advantage accepted, received, practices or given in violation of the Elkins Act, for the reasons that it does not appear in said indictment that any common carrier subject to the interstate commerce act granted or gave such concession, discrimination or advantage.

(2) The acts charged do not constitute the receipt on the part of the defendant of a concession or advantage given or discrimination practiced in respect to the transportation of any property in interstate commerce by any common carrier in that said carriers were not required by Interstate Commerce Commission Order No. 23 to transport coal according to any prescribed classes of purposes and order of classes.

(3) Service order No. 23, particularly paragraph 7 thereof, makes no rules, regulations or practices applicable to the transportation of coal for different classes of purposes and different order of classes, said order being applicable only to car service, which does not denote or connote transportation.

(4) The defendant was, during all the times in said indictment alleged, entitled to have furnished it safe and adequate car service and to make request for and to receive transportation of its property in interstate commerce without regard to the restrictions attempted to be imposed by service order No. 23, especially paragraph 7 thereof, for the reason that said service order was beyond the power of the Interstate Commerce Commission to make and promulgate, in so far as said defendant was concerned, in the following respects, to wit:

(a) Service order No. 23, particularly paragraph 7 thereof, is the attempted exercise of purely legislative powers which are vested in the Congress of the United States by article 1, sections 1 and 8 of the Constitution of the United States and are not subject to delegation.

75 (b) Said service order No. 23, particularly paragraph 7 thereof, exceeds the authority conferred upon the Interstate Commerce Commission in the interstate commerce act, as amended.

(c) The commission was not authorized or empowered by said interstate commerce act to make and enforce, without notice or hearing, the rules, regulations, and practices relating to car service attempted to be made and enforced in service order No. 23 as binding upon and applicable to a shipper or consignee.

(d) The commission was not authorized or empowered by said interstate commerce act to make and enforce, without notice or hearing, the rules, regulations, and practices relating to transportation attempted to be made and enforced in and by said service order No. 23, particularly paragraph 7 thereof, as binding upon and applicable to a shipper or consignee.

(e) Service order No. 23, particularly paragraph 7 thereof, in so far as it attempts to control the loading, transportation, supply, and use of coal, the diversion and the reconsignment thereof, is invalid as in excess of the constitutional grant of power to Congress to regulate commerce among the several States, and is in excess of any authority conferred by Congress upon the Interstate Commerce Commission.

(f) Service order No. 23, particularly paragraph 7 thereof, violates the fifth amendment of the Constitution of the United States, in that by the priorities therein attempted to be created persons engaged in and depending upon industries and industrial operations wherein coal is required, which are placed in subsequent priority classification, are deprived of liberty and property without due process of law, and in that the priority in favor of all users of coal who may be supplied from Lake Superior in respect to all uses and purposes constitutes such discrimination as amounts to a deprivation of liberty and property without due process of law in respect to other users of coal.

(g) Service order No. 23, particularly paragraph 7 thereof, is invalid as in violation of section 9, Article I of the Constitution of the United States, in that it gives a preference to the Lake Erie ports of Ohio and Pennsylvania and the Lake Superior ports of Michigan, Wisconsin, and Minnesota over those of the other States.

(h) There had not been, as appears in said indictment, any consignment of the coal in question to any class 2 purpose as defined in service order No. 23, and there was hence no diversion to or reconsignment for any other purpose.

(i) The acts charged do not constitute any offense under the interstate commerce act or the Elkins Act, in that the said acts charged are not prohibited nor made punishable in any way.

(5) Congress is without constitutional power to affect the use, loading and transportation, and distribution of coal, and to exercise a local police power under the guise of regulating commerce.

And that the said Michigan Portland Cement Company is now bound by the law of the land to answer the same, and this it is ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said Michigan Portland Cement Company prays judgment, and that by the court it may be dismissed and discharged from the said premises in the said indictment specified.

This demurrer upon each and every ground above set forth is made applicable to each and every count of the indictment.

BEAUMONT, SMITH & HARRIS,
Attorneys for Defendant.

[File indorsement omitted.]

76 In United States District Court

[Title omitted.]

Memorandum opinion

Filed September 22, 1924

TUTTLE, District Judge.

The demurrer to the indictment in this cause involves, in all substantial respects, the same facts and questions as are involved in the case of United States vs. The P. Koenig Coal Company, Number 8875, decided by written opinion of this court filed this day. The opinion, therefore, in that case controls and determines the decision here and for the reasons there pointed out the demurrer to the indictment herein must be sustained and an order to that effect will be entered.

ARTHUR J. TUTTLE,
District Judge.

Detroit, Mich., September 22nd, 1924.

[File indorsement omitted.]

77 In United States District Court

Order sustaining demurrer

September 22, 1924

[Title omitted.]

In this cause demurrer to the indictment herein having been heretofore duly argued and submitted, and the court having taken time for mature deliberation thereon, does now here order that said demurrer be, and the same is, hereby sustained, in accordance with the terms of the written opinion this day filed herein.

78 In United States District Court

[Title omitted.]

Assignment of errors

Filed October 18, 1924

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for writ of error, files the following assignment of errors on which it will rely on its writ of error to the Supreme Court of the United States from the final judgment of the district court entered September 22, 1924.

The district court erred:

1. In sustaining the demurrer.
2. In not overruling the demurrer.
3. In not sustaining the indictment.
4. In holding and adjudging that the acts alleged in the indictment do not constitute the offense charged.
5. In holding and adjudging that the acts alleged in the indictment on which the defendant is charged with having knowingly accepted or received certain illegal concessions or discriminations in respect to the transportation of property in interstate commerce do not constitute a violation of section 1 of the Elkins Act (C.. 708, 32 Stat. 847) as amended by section 2 of the Hepburn Act (C. 3591, 34 Stat. 587).
6. In not holding and adjudging that the acts alleged in the indictment constitute on the part of the defendant the acceptance or receipt by the defendant of certain illegal concessions or discriminations within the meaning of section 1 of the Elkins Act (C. 706, 32 Stat. 847) as amended by section 2 of the Hepburn Act (C. 3591, 34 Stat. 587).

79 7. In deciding and holding as follows:

The demurrer to the indictment in this cause involves, in all substantial respects, the same facts and questions as are involved in the case of United States vs. The P. Koenig Coal Company, Number 8875, decided by written opinion of this court filed this day. The opinion therefore, in that case controls and determines the decision here and for the reasons there pointed out the demurrer to the indictment herein must be sustained and an order to that effect will be entered.

8. In deciding and holding as follows:

Now, nothing could be clearer than that, under the express allegations of the indictment involved, the advantage obtained is explicitly declared to have been received by the defendant from the carriers, not as a benefit yielded or consciously granted by them, but solely through and by means of deception practiced upon them by the defendant. The Government charges in substance that the carriers were tricked by the defendant into transporting this coal, which they would not have done "but for said device and deception."

To say, under these alleged circumstances, that the carriers thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion to do violence to the plain meaning of language and to fail to call things by their proper names.

9. In deciding and holding as follows:

If an advantage obtained by such artifice and fraud be a concession, accepted or received by the deceiver from his victim (and, therefore, necessarily granted or given, even although unknowingly, by the deceived), then the hobo who steals a ride on the "bumpers" of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession "given" him though not knowingly. I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same. Although I am aware that in the only reported decision, so far as I can learn, involving this precise question (that of the district judge in United States vs. Metropolitan Lumber Co., 254 Fed. 335), a contrary opinion was reached, I am unable, after careful study of that decision, to approve or accept the conclusions there expressed. I can not avoid the conviction that they embody, and are based upon, the reasoning to which I have already referred and with which I can not agree.

10. In deciding and holding as follows:

Nor is it without significance, as bearing upon the meaning of this statute, that an entirely different statute (section 10 of the act of Feb. 4, 1887, ch. 104, 24 Stat. 382 as amended) expressly forbids the obtaining of various kinds of rebates by means of false statements, "whether with or without the consent or connivance of the carrier," being apparently intended by Congress to relate to an evil not also covered by any other statutory provision.

80 11. In deciding and holding as follows:

In view of the considerations mentioned, and bearing in mind that the penal statute involved should be construed strictly and limited to the plain meaning of the language used, I reach the conclusion that it can not properly be so extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar.

12. In deciding and holding as follows:

For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer.

13. In entering the order sustaining the demurrr.

Wherefore, the United States of America prays that the final judgment of the district court entered September 22, 1924, sustaining the demurrer be reversed, annulled, and set aside, and for such other and further order as may be appropriate.

DELOS G. SMITH,
United States Attorney.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

[File indorsement omitted.]

81 In United States District Court

[Title omitted.]

Petition for writ of error

Filed October 13, 1924

United States of America, plaintiff, by its counsel, now comes and says that on or about September 22, 1924, this court filed its opinion and entered its judgment in favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors now on file.

Wherefore, United States of America prays that a writ of error may issue in its behalf to the Supreme Court of the United States for the correction of error so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States, in accordance with the provisions of the act of Congress approved March 2, 1907 (34 Stat. 1246).

DELOS G. SMITH,
United States Attorney.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General

Allowed:
CHARLES C. SIMONS,
United States District Judge.
[File indorsement omitted.]

82 In United States District Court

[Title omitted.]

Order allowing writ of error

Filed October 18, 1924

United States of America, plaintiff, having made and filed its petition praying a writ of error to the Supreme Court of the United States from the final judgment of the district court entered September 22, 1924, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the writ of error be and the same is hereby allowed as prayed and made returnable within thirty (30) days from the date hereof and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said final judgment was made and entered to the Supreme Court of the United States.

CHARLES C. SIMONS,
United States District Judge.

[File indorsement omitted.]

83 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed November 17, 1924

To the Clerk of the District Court:

Please transmit as the transcript of the record in the above entitled cause, the following pleadings, documents and records to the Supreme Court of the United States:

1. Indictment.
2. Arraignment and plea.
3. Order granting leave to file demurrer.
4. Demurrer.
5. Opinion of the court.
6. Order on opinion sustaining demurrer.
7. Petition for writ of error.
8. Assignments of error.
9. Order allowing writ of error.

DELOS G. SMITH,
United States Attorney.

I hereby acknowledge service upon me of the above præcipe. Objection is made and exception noted as to return of indictment in its

entirety. One count and stipulation that all others are similar is sufficient.

HAL H. SMITH,
THOMAS B. MOORE,
Attorneys for Appellee.

Dated this 17th day of November, A. D. 1924.
[File indorsement omitted.]

84 In United States District Court

[Title omitted.]

Writ of error

Filed October 18, 1924

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District Court of the United States for the Eastern District of Michigan, Southern Division, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between the United States of America, plaintiff, and Michigan Portland Cement Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to
85 correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-four.

[SEAL.] ELMER W. VOORHEIS,
Clerk of the District Court of the United States.

[File indorsement omitted.]

86 [Citation in usual form showing service on Smith & Harris et al. omitted in printing.]

87 In United States District Court

[Title omitted.]

Clerk's certificate

I, Elmer W. Voorheis, clerk of the District Court of United States for the Eastern District of Michigan, do hereby certify and return to writ of error, sued out by the United States of America in the above entitled cause; that it is a true copy of the records and proceedings designated to be included in my said return, as the same appears of record and on file in my office; that I have compared the foregoing record with the originals, and that it is a true and correct transcript therefrom, and of the whole of such designated records and proceedings in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this twenty-sixth day of November, in the year of our Lord, one thousand nine hundred and twenty-four, and of the Independence of the United States of America, the one hundred and forty-ninth.

[SEAL.] ELMER W. VOORHEIS,
Clerk, United States District Court,
Eastern District of Michigan.

[Indorsed on wrapper:] File No. 30,722. E. Michigan D. C. U. S. Term No. 757. The United States of America, plaintiff in error, vs. Michigan Portland Cement Company. Filed December 3, 1924. File No. 30,722.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1925

CONTENTS

CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 216

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

THE P. KOENIG COAL COMPANY

No. 217

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

MICHIGAN PORTLAND CEMENT COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES

OPINION

The opinion of District Judge Tuttle in No. 216 is reported as *United States* v. *P. Koenig Coal Co.*, 1 Fed. Rep. (2d) 738.[1]

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[1] In No. 217 the opinion of the District Court in No. 216 was adopted as controlling (No. 217, p. 42).

JURISDICTION

In each case the District Court, on September 22, 1924, sustained a demurrer to the indictment (No. 216, p. 54; No. 217, p. 42). The Government, on October 18, 1924 (R. 217, 57; R. 217, 46), prosecuted writs of error under Act of March 2, 1907, c. 2564, 34 Stat. 1246, which provides that a writ of error from the District Court may be taken directly to this Court, " From a decision or judgment quashing, setting aside, or *sustaining a demurrer to* any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." The District Court so construed the Elkins Act as to exclude from the provisions thereof the concessions charged (R. 216, 52).

QUESTION

The question is whether Section 1 of the Elkins Act of February 19, 1903 (Ch. 708, 32 Stat. 847), as amended by Section 2 of the Hepburn Act of June 29, 1906 (Ch. 3591, 34 Stat. 587), condemns and punishes a shipper for knowingly accepting and receiving concessions from carriers in respect to the transportation of property in interstate commerce, which concessions he obtained because of the false, fraudulent, and deceitful representations which he made to the carriers and on which the carriers innocently and in good faith relied.

STATEMENT

No. 216

The P. Koenig Coal Company, Detroit, a Michigan corporation, stands indicted on 18 counts covering as many carloads of coal. All of the 18 shipments originated in West Virginia and moved to Detroit in August, 1922. Chesapeake & Ohio was the initial carrier for each car.

Count 1 charges that, on July 25, 1922, the Interstate Commerce Commission was of opinion that an emergency requiring immediate action then existed upon all of the railroad lines lying east of the Mississippi River. Acting under its authority, on that day the Commission promulgated Service Order No. 23, and suspended, from and after July 26, 1922, all of the rules, regulations, and practices with respect to car service which conflicted with the directions of Service Order No. 23. By that order it was provided that each carrier, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line, should give preference and priority to the movement of certain commodities, among which was coal. In supplying cars to mines upon the lines of any coal-loading carrier—that is, a carrier serving coal mines located upon its own line—such carrier should place at, furnish with, and assign to such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of

classes indicated by their numbers, Class I being for such purposes as might from time to time be specially designated by the Commission or its agents. The carriers should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of hospitals, which were placed in Class 2, over such placement and assignment of cars for the loading of coal required for the manufacturing of automobiles or automobile parts, which were then placed in Class 5, but later, by an amendment to Service Order No. 23, effective August 30, 1922, in Class 3.

Coal shipped and consigned for the current use of hospitals should not be reconsigned or diverted for such manufacturing purposes. Service Order No. 23 and the amendment remained in full force and effect from July 26 to September 20, 1922. There was in fact during all of that time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of Chesapeake & Ohio Railway, resulting from strikes and nonaction of employees whose duty it was to keep such equipment in repair and in a serviceable condition, as that the Company was currently unable promptly to transport all freight offered to it for movement or to be moved over its lines. Although Chesapeake & Ohio was able to place at, furnish with, and assign to coal mines upon its lines cars suitable for loading and trans-

portation of a portion of the coal required for the current use of hospitals and for the current use of other consumers of coal in the same class with hospitals, i. e., Class 2, 78 per cent thereof, it was then unable to place at, furnish with, or assign to coal mines upon its lines any suitable cars whatever for the loading and transportation of coal required for the manufacture of automobiles or parts thereof, or any suitable cars whatever for Class 3 or Class 5, or for any purpose except Class 1 and Class 2.

Count 1 further charges that on August 31, 1922, appellee, a corporation coal dealer, well knowing the premises, " unlawfully did knowingly accept and receive a certain concession " in respect to the transportation of certain property whereby an advantage was given to the appellee " and a discrimination was practiced in its favor and against all other such coal dealers," and " all shippers desirous of shipping coal embraced in Classes 3 and 5 from mines located on the line of Chesapeake & Ohio."

Count 1 further charges that on August 2, 1922, " and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal which it was not then lawfully entitled to receive," and intending to procure for the concern named the transportation of the coal from West Virginia to Detroit, for the use of that concern in the manufacture of automobiles and parts

thereof, and to divert and deliver the same to that concern, appellee adopted this device: on that day appellee by sending from Detroit to Monitor Coal & Coke Company, Huntington, W. Va., a telegraphic order for coal, which purported to be an order for the shipments of five carloads of coal to the Samaritan Hospital, Detroit, in care of appellee, and to be delivered there to appellee upon its sidetrack connecting with the line of Grand Trunk Railway, for the use of Samaritan Hospital, induced the placing, furnishing, and assigning, by Chesapeake & Ohio, on August 5, 1922, at request of the Monitor Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its line in West Virginia, C. & O., car 60260, at Monitor Mine, No. 2, at Logan, the loading of the car with 96,700 pounds of coal, the tendering by Monitor Company to Chesapeake & Ohio for transportation of the loaded car, billed and consigned in accordance with the telegraphic order, the transportation thereof from Logan to Detroit, in accordance with the billing, and its delivery there, on August 31, 1922, to appellee, upon the Grand Trunk siding, which delivery appellee then and there accepted; " and which said device then and there was a deceptive device because none of said carriers than (then) had any knowledge of said intentions " of said appellee.[2]

[2] The car moved over Chesapeake & Ohio, D., T. & I., Wabash, and Grand Trunk.

Count 1 further charges that appellee, in pursuance of its said intentions and as a final step in a device for securing the unlawful concession, immediately upon the receipt and acceptance by it of the coal at Detroit, diverted and delivered the same in the car to Dodge Brothers, automobile manufacturers, who used the coal; the Samaritan Hospital did not need or require the coal, and had not authorized or requested appellee to use its name for appellee, Dodge Brothers, or any consumer whatever.

Count 1 further charges that appellee "by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property * * * obtained by deception practiced by it upon said carriers, whereby an advantage was given by those carriers" to appellee, which, by the force of Service Order No. 23, as appellee well knew, was not then open or due to it, and which the said carriers, "but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others."

The form and substance of each count are in all respects the same. In 3 counts the name of Samaritan Hospital was used. In 1 count the name of Providence Hospital was used. In 11 counts the name of St. Mary's Hospital was used. In 2 counts the name of Detroit Creamery Company was used. In 1 count the name of Towars Creamery was used.

In 8 counts Logan was the point of origin, in 4 counts Yolyn, in 4 counts Lundale, and in 2 counts Dabney.

In 4 counts the coal was shipped by Monitor Coal & Coke Company, in 4 counts by Yuma Coal & Coke Company, in 4 counts by Argyle Coal Company, in 4 counts by Lundale Coal Company and in 2 counts by Thurmond Coal Company.

In 15 counts Dodge Brothers were the ultimate consumers and used the coal in the manufacture of automobiles. Fisher Body Corporation, manufacturers of automobile bodies, used the remaining 3.

No. 217

Michigan Portland Cement Company, a Michigan corporation, stands indicted on 15 counts covering as many carloads of coal. All of the 15 shipments originated in Kentucky, and moved to "Four Mile Lake," a point in Michigan, in August and September, 1922. Louisville & Nashville Railroad was the initial carrier.

The facts alleged in this indictment, which constitute the gravamen of the offense and the deceptive device used by the appellee in obtaining the concessions in transportation, are set out in detail therein, and are quite similar to the facts and the deceptive device alleged in No. 216.

Count 1 charges the promulgation of Service Order No. 23 by the Commission, the contents thereof, and the order of priority in which the coal cars should be placed at, and assigned to, the coal mines

by the coal loading carriers. Coal required for Class 2 purposes included, among other things, coal required for the current use of public utilities which directly served the general public, under a franchise therefor, with street and interurban railways, electric power and light, gas, water and sewer works. Coal required for Class 5 purposes (later designated Class 3) included coal required for the purpose of manufacturing of Portland cement. Coal consigned for a purpose in Class 2 should not be reconsigned or diverted except for some other purpose in Class 2, or for a purpose in Class 1.

During the emergency period indicated, Louisville & Nashville Railroad, on account of the strikes and shortage of equipment, was able to place and assign to coal mines upon its lines only 50 per cent of the coal cars required for Class 1 and Class 2 purposes, and it was unable to place and assign to such mines any coal cars for the loading and transportation of coal required for purposes in Class 3, Class 4, and Class 5.

Count 1 further charges that Michigan Portland Cement Company, during the period indicated, was engaged in the manufacture of Portland cement, and customarily accepted delivery of carload shipments from the Michigan Central Railroad Company, at and upon certain railway tracks or private sidings owned by Michigan Portland Cement Company, which connected with the railway line of Michigan Central, the private siding and connection then being at "Four Mile Lake."

Count 1 further charges in particularity the request made by the Wilson-Berger Coal Company upon the Louisville & Nashville for 29 coal cars to be placed on August 11, 1922, at its Coburn mine, at Coburn, Ky., for the loading and transportation of coal for Class 2 purposes, the placement and assignment of 9 specific coal cars at that mine on that date, and the loading with bituminous coal of each of those cars.

Count 1 further charges that on September 4, 1922, appellee, then and before then well knowing the premises, at Four Mile Lake " unlawfully did knowingly accept and receive a certain concession in respect to the transportation of certain of said property in interstate commerce" by Louisville & Nashville, Cleveland, Cincinnati, Chicago & St. Louis Railway, Cincinnati Northern, and Michigan Central Companies, "whereby an advantage was given to said Michigan Portland Cement Company and a discrimination was practiced in its favor and against all other shippers in its class desirous of shipping coal embraced in Classes 3 and 5."

Count 1 further charges that on August 23, 1922, appellee, with the assistance of Bewley-Darst Coal Company, purchased a large quantity of coal, including the coal which was loaded in car number " 28108," from the Central Fuel Company; and, on August 23, 1922, then intending by a device to procure Class 2 preference and priority in the

placement and assignment of coal cars for the loading and transportation of coal to be used for the purpose of manufacturing of Portland cement, and intending to procure the transportation of that carload of coal in interstate commerce for the use by it in the manufacturing of Portland cement, knowingly directed the Bewley-Darst and the Central Fuel companies to tender all of such coal for transportation, billed and consigned to "Municipal Light and Power Company, Four Mile Lake, Michigan Central delivery." Pursuant to and by reason of those instructions Louisville & Nashville so billed the car of coal and transported it accordingly. On September 4, 1922, pursuant to the instructions and billing and a further instruction given by appellee to the Michigan Central that the car of coal be delivered to appellee upon its private siding, the carload of coal was delivered to appellee on its private siding at Four Mile Lake instead of at the Municipal Light and Power plant owned by the municipality of Chelsea nearby. The appellee knowingly accepted delivery of the carload of coal upon its private siding and used the coal for the purpose of manufacturing Portland cement.

Count 1 further charges that at the times of the giving by appellee of the shipping instructions to Bewley-Darst Coal Company and Central Fuel Company, of its acceptance of delivery of said carload of coal, and of its using the carload of coal

for the purpose of manufacturing Portland cement, appellee then well knew the municipality of Chelsea did not need or require the carload of coal, and had not authorized or requested appellee to procure or provide any coal for it whatsoever.

Count 1 further charges that appellee " by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property * * * obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers," to appellee, which, by the force of Service Order No. 23, as appellee well knew, was not then due or open to it, and which the carriers " but for said deceptive billing, device, and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others."

In each of the 15 counts the car moved over Louisville & Nashville, Cleveland, Cincinnati, Chicago & St. Louis, Cincinnati Northern, and Michigan Central railroads. Thirteen cars were consigned to the Municipal Light and Power Company, Four Mile Lake (R. 7), and 2 cars to City Electric Light and Power Company, Four Mile Lake. The municipality of Chelsea owns and operates an electric light and power plant near Four Mile Lake (R. 7). Nine cars were loaded at the Coburn mine, Coburn, Ky., 4 cars were loaded at the Merna mine, Merna, Ky., and 2 cars were

loaded at the Storm King mine Storm King, Ky. In all of the counts Michigan Portland Cement Company was the real consignee which consumed the coal.

PROCEEDINGS IN THE DISTRICT COURT

To each indictment a demurrer was interposed on substantially the following grounds (No. 216, 48; No. 217, 40).

1. The facts charged do not constitute a concession under the Elkins Act.

2. Service Order No. 23 was beyond the power of the Commission as an attempted exercise of legislative power.

3. Service Order No. 23 was even beyond the power of Congress to enact.

4. Service Order No. 23 prefers Lake Superior ports.

5. Service Order No. 23 violates the Fifth Amendment because it deprives the appellee (No. 216) " of his trade custom and profits ".

6. Service Order No. 23 was unauthorized as the Commission may not make such rules, regulations, and practices binding upon and applicable to a shipper.

The learned District Court sustained the demurrers (No. 216, 54; No. 217, 42) on the sole ground that no offense was charged under the Elkins Act as amended. The Court expressly construed the statute in the following words: " I reach the conclusion that it can not properly be so

extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar " (R. 216, 54).

The basis of the ruling is thus stated (No. 216, 53): " If an advantage obtained by such artifice and fraud be a concession accepted or received by the deceiver from his victim (and, therefore, necessarily granted or given, even although unknowingly, by the deceived), then the hobo who steals a ride on the ' bumpers ' of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession ' given ' him, though not knowingly. I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same."

ERRORS ASSIGNED

Errors were then assigned in each case and the writs prosecuted. Summarized, the errors relate to the action of the District Court—

1. In so construing the statute as to exclude therefrom the offense charged.

2. In accepting the language and illustrations which the District Court adopted as the basis for its opinion.

3. In holding the facts charged did not constitute a concession under the Elkins Act as amended as that act was construed by the Court.

4. In sustaining the demurrers.

THE STATUTE.[3] (Ch. 3591, 34 Stat. 584)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, be amended so as to read as follows:

* * * * *

"Section 2. * * *

" That section one of the Act entitled 'An Act to further regulate commerce with foreign nations and among the states,' approved February nine-

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[3] The text of the pertinent provisions of the Act of February 19, 1903, is as follows (Ch. 708, 32 Stat. 847):

"Chap. 708.—An Act To further regulate commerce with foreign nations and among the States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. * * *."

teenth, nineteen hundred and three, be amended so as to read as follows:

* * * * *

and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *." (Ch. 3591, 34 Stat. 587, 588.) (Approved June 29, 1906.)

ARGUMENT

SUMMARY

I. All questions of constitutional law and lack of power in the Commission attempted to be raised by the demurrers have gone over the dam (*Avent* v. *United States,* 266 U. S. 127, 130).

II. The only question saved to appellees is the construction of the Elkins Act.

III. The purpose of the act was " to cut up by the roots every form of discrimination, favoritism, and inequality " (*Louisville & Nashville* v. *Mottley,* 219 U. S. 467, 478), and " to require equal treatment of all shippers and prohibit unjust discrimination in favor of any of them," and " to prevent favoritism by any means or device whatsoever " (*United States* v. *Union Stock Yard,* 226 U. S. 286, 307, 309). " The Elkins Act proceeded upon broad lines * * * " (*Armour Packing Co.* v. *United States,* 209 U. S. 56, 72).

IV. The deception practiced upon the carriers by the false and fraudulent device enabled the appellees to obtain the unlawful concessions. No fine distinctions sought to be drawn between acquisition of those concessions by trickery and deception on the part of the shipper, and the action of carriers in knowingly granting them, will save the appellees from the penalties of the statute (*United States* v. *Metropolitan Lumber Co.,* 254 Fed. Rep. 335; *United States* v. *Vacuum Oil Co.,* 153 Fed. Rep. 598).

V. Coal is a national necessity. Its diversion from Class 2 (hospitals) to Class 5 (" trade custom and profits ") through trickery and deception by a false and fraudulent device to obtain railway transportation may not be cast aside as in the simile with the hobo on the bumpers who steals a ride or a thief who picks the pocket of the conductor. Acquiring transportation of coal in carloads or trainloads in times of emergency or possible calamity by trickery may not be dealt with on the same basis even though morally all of the transactions stand on the same footing.

VI. If Service Order No. 23 is not protected by the Elkins Act as amended and there is no law by which punishment may be dealt to these appellees, then all service orders issued by the Commission will become instrumentalities destructive of the common good, for they at once will be used by the dishonest through trickery and deception to divert the coal from the classes ordered by the Commission to " his trade custom and profits." In short, the order may be used to destroy that which it was designed to maintain.

VII. If the appellees may not be reached and punished under the Elkins Act, the statute which provides for relief in times of emergency and all service orders issued in pursuance thereof become at once practically useless as there is no other statute under which the Government may proceed (*United States* v. *Metropolitan Lumber Co.*, 254 Fed. Rep. 335).

I

AS TO ALL QUESTIONS OF CONSTITUTIONAL LAW AND LACK OF POWER IN THE COMMISSION, SERVICE ORDER NO. 23 [4] HAS ALREADY BEEN SUSTAINED

In the summer of 1922 the strikes of the United Mine Workers in the bituminous fields and of the Federated Shop Crafts of the railways were threatening to engulf the Nation in a national calamity (*United States* v. *Railway Employees,* 283 Fed. Rep. 479; 286 Fed. Rep. 228; 290 Fed. Rep. 978).

Service Order No. 23 was promulgated on July 25, 1922, because the Commission was of opinion that an emergency requiring immediate action then existed upon the lines of the railroads operating east of the Mississippi River. The carriers were directed to give preference and priority to the movement of food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil; that in the supply of cars to coal mines carriers were directed to place, furnish, and assign cars to mines suitable for loading and transportation of coal in succession as might be required for the following classes of purposes and in the following order of classes, viz: Class 1, such special purposes as may be specially designated by the Commission. Class 2, fuel for (a) railroads, ships, and vessels; (b) public utilities, including street and interurban railways, electric power and light, gas, water and sewers; (c) United States, State and municipal governments, hospi-

[4] Appendix A.

tals, schools, and other public institutions. Class 3, bituminous coal consigned to any Lake Erie ports for transshipment by water to ports upon Lake Superior. Class 4, commercial sizes of coal for domestic use. Class 5, other purposes.

Order No. 23 further provided that no coal embraced in Classes 1, 2, 3, or 4 shall be subject to reconsignment or diversion except for some purpose in the same class or in a superior class in the order of priority prescribed.

In *Avent* v. *United States,* 266 U. S. 127, 130, this Court, on a writ of error invo'ving facts in all respects similar, and citing numerous cases, said, with respect to Service Order No. 23, (a) " That in such circumstances Congress could require a preference in the order of purposes for which coal should be carried, consistently with the Fifth Amendment, is clear and is assumed," (b) " That it can do so without trenching upon the powers reserved to the States seems to us not to need argument," (c) " That it can give the powers here given to the Commission, if that question is open here, no longer admits of dispute," (d) " The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed," (e) " Congress may make violation of the Commission's rules a crime," and (f) " The alleged preference of ports if there is

anything in the objection does not concern the plaintiff in error."

II

THE CONCESSION OBTAINED BY THE DEVICE ADOPTED IS PROHIBITED BY THE ELKINS ACT

Through the device used the appellees knowingly received the concession. There can be no question about that. Was the concession so received prohibited by the statute?

(A) THE ELKINS ACT

The all-embracing provisions make it unlawful for—

a, any person, persons, or corporation
b, to offer, grant, or give,
c, or to solicit, accept or *receive*
d, any rebate, concession, or discrimination in respect to the transportation of any property * * *
e, whereby any such property shall *by any device whatever* be transported at a less rate * * *,
f, or whereby any other advantage is given or discrimination is practiced—

and—

a, Every person or corporation, whether carrier or shipper, who shall,
b, knowingly,
c, offer, grant, or give,
d, or solicit, accept, or receive
e, any such rebates, concession, or discrimination
f, shall be deemed guilty, etc.

" On demurrer all the averments in the count are to be taken as true, and it is not easy to see wherein they are defective," said Circuit Judge McPherson in *Knoell* v. *United States,* 239 Fed. Rep. 16, 19 (C. C. A.). The learned District Judge said in the instant case (1 Fed Rep. (2d) 740), " It cannot be doubted that the conduct of which the defendant is here accused was, if indulged in, most reprehensible and deserving of severe condemnation. The sole question, however, with which this court is now concerned is whether such conduct constitutes the acceptance or receipt of a ' concession ' from a common carrier railroad, as denounced by the statute invoked by the government " (R. 216, 52).

Under the plain provisions of the statute invoked in the indictment the forbidden " concession " is *any* concession in respect to the transportation of any property in interstate commerce whereby *any* advantage is given to one shipper to the prejudice or disadvantage of another shipper, *or* whereby *any* discrimination is practiced to the advantage of one shipper and the disadvantage of another shipper.

The provisions of the statute are stated in the disjunctive. The pertinent words are " offer, grant or give; *or* solicit, accept or receive." There is no express provision which makes the knowledge or connivance of the carrier an element of the offense. Under the wording of the statute, if a

shipper "receives" a "concession" "whereby any other advantage is given *or* a discrimination is practiced," he violates the statute. The statute does not use the conjunction "and". If it did, then a violation of the act would require both a conscious giving of the concession on the part of the carriers *and* a conscious receipt of the concession on the part of the shipper. The use of the disjunctive "or" makes either the carrier or shipper liable under the statute without the conscious participation in the condemned practice on the part of the other.

The Government maintains the words are susceptible of this construction: it shall be unlawful for any corporation knowingly to receive any concession in respect to the transportation of any property whereby any such property shall by any device whatever be transported at a less rate * * * or whereby any other advantage is given or discrimination is practiced.

(B) THE SCOPE OF THE ELKINS ACT

The Elkins Act is a remedial statute entitled to that interpretation which reasonably accomplishes the great purpose which it was enacted to subserve and an interpretation that is not so narrow as to defeat the obvious intention of Congress (*Logan* v. *Davis,* 233 U. S. 613, 628; *United States* v. *Lacher,* 134 U. S. 624, 628; *United States* v. *Martin,* 176 Fed. Rep. 110, 113).

The interpretation of the District Court is too narrow. Assume that a carrier, in the distribution of coal cars, favored shipper A to the prejudice of shipper B. Of course, it could not be shown that the carrier and shipper A consciously joined or participated in the discrimination. Under the interpretation of the District Court, no prosecution of the carrier could be instituted under the Elkins Act because the favored shipper did not consciously participate with the carrier in inflicting the injury. Similar argument may be made in respect of rebates and concessions.

The intention of the Congress to enact a statute which would outline offenses of shippers, distinct from offenses of carriers, is reflected in the report of the House Committee on Interstate and Foreign Commerce, February 12, 1903, on Senate Bill No. 7053, which, as amended, became the Elkins Act. Chairman Knapp of the Interstate Commerce Commission is quoted in that report as follows (Rep. 3765, 57 Cong. 2d Session):

> I want two things: I want the corporation carrier made liable and I want the shipper made liable when he accepts a preference or secret rate whether there is discrimination or not.

From 1887, when Congress first enacted the Act to regulate commerce until it enacted the Elkins Act in February, 1903, the Congress had repeatedly amended the criminal provisions of the Act to regulate commerce with purpose to prohibit all re-

bates, concessions, and discriminations in connection with railroad transportation service. As indicating that a narrow interpretation of the meaning of the Elkins Act is not in consonance with the intention of the Congress, the following statements are further quoted from the Committee report:

> The first and second propositions above referred to practically exhaust the power of legislation to prevent rebates and discriminations through criminal prosecutions.
>
> * * * * *
>
> Your Committee believes that the legislation proposes by the Elkins Bill, together with the present interstate commerce law, covers about all the ways that thought or language can devise or describe to prevent the granting of discriminations in favor of one shipper as against another, or the building up of one concern through the favoritism of railroad corporations.

(C) THE DECISIONS OF THE COURTS

The courts have repeatedly pointed out that interpretations of the meaning of the Elkins Act should reflect the broad purposes of that statute. *United States* v. *New York, New Haven & Hartford,* 153 Fed. Rep. 630, 633:

> Moreover, this provision of the statute (section 1, Elkins Act) should receive a construction in harmony with the spirit of the Act, and, though ordinarily a statute which imposed a penalty, is not strictly construed against a defendant, yet, where the manifest

purpose of the statute is remedial, the object of the legislature in enacting the same is the important consideration. .

New York, New Haven & Hartford v. *Commission,* 200 U. S. 361, 391:

> It can not be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

Armour Packing Co. v. *United States,* 209 U. S. 56, 72:

> The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished but the intention was to prohibit any and all

> means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

United States v. *Union Stock Yard,* 226 U. S. 286, 309

> It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the Commerce Court should have enjoined the carrying out of this contract.

See also—

Chicago & Alton v. *Kirby,* 225 U. S. 155, 165.

Louisville & Nashville v. *Mottley,* 219 U. S. 467.

Vandalia Railway v. *United States,* 226 Fed. Rep. 713.

Northern Central Railway v. *United States,* 241 Fed. Rep. 25.

(D) CONCERTED OR COLLUSIVE ACTION OF SHIPPER AND CARRIER UNNECESSARY

Appellees contend that the shipper can not accept or receive a concession, discrimination or advantage unless the carrier knowingly grants or gives the same. The contention is that the Elkins Act is applicable only when carrier and shipper are acting in collusion and in concert. Under that opinion no violation of section 1 of the Elkins Act by a common carrier or a shipper can be estab-

lished in the absence of proof that each of them, voluntarily, consciously, and knowingly concurred and participated in the prohibited acts and conduct of the other.

This interpretation of a criminal statute given by the District Court which has the effect of imposing such a double burden of proof upon the Government, without express authority, is not consistent with any interpretation of criminal statutes which has come to our attention.

That interpretation casts a heavy burden of averment and proof on the Government. In the prosecution of either a common carrier or a shipper by indictment under that section, the Government must allege and prove that the offense was knowingly and consciously committed by the defendant and also by another. It must prove conspiracy. Such a contention is grossly unsound and such an interpretation would defeat the very purpose of the Elkins Act " to cut up by the roots every form of discrimination, favoritism and inequality." Is it logical that Congress intended to permit a shipper to be immune to prosecution if he were clever enough to obtain and receive a discrimination or advantage in transportation by practicing deception or subterfuge on the carrier? Is not the injury and injustice to the public and to the shippers' competitors equally as vicious when the concession is obtained *without* the knowledge of the carrier as it is when the carrier and shipper connive? Is it

not the secret and underhanded advantages in transportation to any shipper that the Elkins Act intends to, and does denounce and prohibit. Are shippers placed on an equal basis when they are allowed to obtain discriminations or advantages in transportation unbeknown to the carrier? Is it plausible that Congress intended to permit the shipper to obtain an advantage by stealth and fraud, which advantage the shipper was prohibited from receiving from the carrier knowingly?

If the construction by the learned District Court is sound, then not only the shipper who perpetrates the fraud and deception without knowledge on the part of the carrier may go with impunity, but likewise the carrier, its officers and agents, may also knowingly grant concessions unknown to the shipper and go with impunity.

The law may not be construed one way for the shipper who practices deception and obtains the concession without knowledge on the part of the carrier, and another way for the carrier who grants concessions without knowledge on the part of the shipper.

It is conceivable, if the Elkins Act shall be construed as claimed by the appellees, that carriers may grant secret concessions without any knowledge whatever on the part of the shipper; thus, certain preferred shippers may be furnished with better cars, better road service, expedition in switching and terminal handling, and better motive power.

Under the construction of the District Court, a concession may with impunity to the carrier knowingly be granted to a shipper and unknowingly received by the latter even though the officer of the carrier who authorized the concession may be part owner of the shipper's business.

Under that construction of section 1 of the Elkins Act the Government cannot institute prosecutions under any Federal statute for the following possible abuses:

(*a*) When in time of emergency the Interstate Commerce Commission, in the public interest, by order requires common carriers temporarily to withdraw part of their service from manufacturers in order that those carriers may furnish adequate service for the transportation of necessities of life, such order may be virtually nullified by shippers who employ deception or misrepresentation, without the knowledge or connivance of carriers, of the kind challenged in the indictment.

(*b*) The distribution of coal cars to virtually all coal mines in the United States is based upon mine ratings computed from information disclosed in affidavits of the coal mine operators. Misrepresentations made through those affidavits, without the knowledge or connivance of carriers, can and may produce widespread discrimination in the distribution of coal cars.

(c) Breaking through or violating of embargoes placed by carriers on either commodities or

localities, or both, by deception practiced by the shipper. Service Order No. 23 does not differ materially from embargoes and under the ruling of the District Court either may be flouted with impunity.

It was not until after the Transportation Act of 1920 was approved, that the Commission issued service orders such as No. 23.[5] While the indictment in the case at bar is the second to come before this Court (*Avent* v. *United States*, 266 U. S. 127), the construction claimed by the Government for the Elkins Act is not new.

In *Missouri, Kansas & Texas Railway* v. *Harriman*, 227 U. S. 657, 671, this Court considered the validity under the Carmack Amendment of a contract for an interstate shipment of livestock. The freight rate was dependent upon the value of the livestock and the concession and discrimination was *knowingly* obtained by the shipper but *not knowingly* granted by the carrier. The Court held that such facts would constitute a violation of the Elkins Act, in the following language by Mr. Justice Lurton:

> When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice,

[5]Appendix B consists of a list of all service orders issued by the Commission since the Transportation Act was approved.

> for the valuation automatically determines which of the rates is the lawful rate. *If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903* (32 Stat. 847, c. 708). *Texas & P. Railway* v. *Mugg,* 202 U. S. 242; *Chicago & A. Railway* v. *Kirby,* 225 U. S. 155. The particular cattle were loaded by the shipper and were never seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped (italics ours).

United States v. *Vacuum Oil Co.,* 153 Fed. Rep. 598, 602, 604. Demurrer to indictment of shipper under Elkins Act for receiving concessions from published tariff rate. In holding that " The evil sought to be remedied must always be considered, and in the Act to regulate commerce the desideratum was the eradication of such evil practices as resulted in the carriage interstate of goods belonging to powerful interests or industries to the detriment of less favored shippers," District Judge Hazel said:

> It will be observed that the proposition with which we are here concerned is not whether the defendants have been benefited by an unjust discrimination as against other shippers over the same route, but have the defendants been given a concession from the

> published tariff rate, a rate of which the public is presumed to have knowledge and upon which other shippers of petroleum have a right to place reliance. The word " concession " does not appear in the earlier acts to regulate commerce, but is used for the first time in section 1 of the Elkins Act, which is apparently a " catchall " provision for any practice *by either carrier or shipper* which by any device whatever would tend to defeat the purpose of the law. The term " concession " does not necessarily imply that the shipper solicited a concession or privilege which the carrier could give. The statute is clearly violated if the defendant has accepted or received any concession or discrimination which resulted in the carriage of the freight in question at a less rate than that established under the act (italics ours).

In *United States* v. *Hocking Valley Railway,* 194 Fed. Rep. 234, 247, 257 (affirmed C. C. A. 210 Fed. Rep. 735), Judge Killitts, in overruling the demurrer to the indictment which alleged that the acceptance of notes in payment of freight charges was an extension of credit in violation of Section 6 of the Interstate Commerce Act and of Section 1 of the Elkins Act, said:

> The court in construing a statute is not called upon to refine its words to an extreme nicety of thought, nor to apply microscopic distinctions in the meanings of words. The analysis of neither a criminal statute nor an indictment thereunder is an excursion in

dialectics. The underlying purpose of the statute is to be observed in construing its words and phrases, which are to be given their ordinary acceptation, unless the latter is clearly modified by usage or definition peculiar to the statute; and the attempt to predicate on the facts alleged an offense is to be considered reasonably by applying those inferences and conclusions which apparently flow naturally from such facts, and which appeal to men of average intelligence as the proper deductions therefrom. The time for keenly analytical reasoning in an effort to discover, in either a statute or an indictment, loopholes of escape by engaging in finely spun discriminations of meaning or by offering turns of thought of which the language is found capable only after deep cogitation disappeared in criminal practice with the passing of the extreme punishments anciently visited on slight offenses.

* * * * *

Of course, it is not practicable for Congress to set a limit on human ingenuity in the devising of schemes obnoxious to the act to regulate commerce by attempting a description of all possible methods. The act accomplishes its end by directly and unmistakably condemning results, wherefore every devisable plan to produce the objectionable conditions is under its ban. Surely our jurisprudence is not so inept and feeble that a statute exhibiting a definite purpose to meet palpable mischiefs must be con-

strued so narrowly as to oblige Congress from time to time to amend it that its provisions may be kept, at the best, only in the immediate rear of a procession of new methods born of the fertility of human invention and designed to circumvent that legislative will which it attempts by each amplifying amendment to express.

In *United States* v. *Metropolitan Lumber Co.*, 254 Fed. Rep. 335, 338, 341, 342, the opinion of District Judge Haight is *on all fours*. The indictments were under the Elkins Act. Under authority of the Director General, and on direction of the Regional Director, Pennsylvania Railroad, because of weather conditions, laid an embargo against the transportation of property, including lumber, not constituting war supplies specifically approved by the War Department. Defendant was engaged in purchasing, shipping and selling lumber. In order to deceive the carriers, defendant, notwithstanding the embargo, caused the lumber to be consigned to "Ira R. Crouse, in care of United States Government Quartermaster, Government order," etc., at Perth Amboy. Believing the lumber to be for Government use, the carrier transported the same as not prohibited by the embargo, although the shipper who practiced the deception knew that the lumber was not war supplies or other property exempted from the operation of the embargo. The defendant was indicted for receiving a discrimination or concession. In overruling demurrers, and

after an exhaustive review of the statutes and prior cases, the learned District Judge said:

> Finally, in the development of the legislative object the Elkins Act was passed, which, by its language, seems to be all-embracing, and to cover the loopholes which the previous acts left open for discrimination and the exercise of favoritism. It also brought within the prohibition of the law many acts of the shipper which had not theretofore been criminal; thus making the law more effective to accomplish the object sought.
>
> It needs no argument to demonstrate that there is fully as much room for the exercise of favoritism and resulting inequality in the granting or withholding of transportation service or facilities as there is in the matter of compensation to be paid for such service, for, as was said by the Interstate Commerce Commission in the matter of The New England Investigation, 27 Interst. Com. Com'n. R. 560, 616, "service is often of even greater importance than the rate itself." This is especially manifest when there exists an embargo, such as the indictments in these cases allege. Hence, bearing in mind that the purpose of Congress in passing the Elkins Act was to utterly eliminate every form or kind of discrimination, favoritism, and inequality, it is quite impossible to believe that when Congress used the broad and comprehensive language which it did, "whereby any other advantage is given or discrimination

is practiced," it intended to cover only advantages or discriminations in the matter of rates or compensation for transportation service. If discrimination in rates was the only evil aimed at why were the words above quoted added? Discrimination in respect to rates had been as completely covered as the English language is capable of by the use of the words " whereby any such property shall by any device whatever be transported at a less rate," etc.

The purpose of Congress being ascertained and it being apparent that to permit discriminations in transportation service would thwart that purpose and the language used in the act being amply sufficient to embrace such discriminations, it seems to me that the conclusion is irresistible that such a discrimination as is complained of in these indictments is within the criminal provisions of the Elkins Act.

* * * * *

The allegations of the indictments forbid the possibility of drawing an inference that the discriminations or concessions which the defendants are alleged to have received were procured with the knowledge, acquiescence, or connivance of the carrier. It is defenddants' contention that such knowledge, acquiescence, or connivance is essential before the acceptance or receipt of a discrimination or concession is criminal under the Elkins Act. While it is admitted that there is nothing in the act which specifically makes the knowledge or connivance of the

> shipper an essential element of the crime, yet it is argued that the words "to give or grant" are correlative with the words "to accept or receive," and that a discrimination can not be accepted or received unless it has been given or granted. That is, of course, true; but it by no means follows therefrom that a discrimination may not have been knowingly received by the shipper and unconsciously given or granted by the carrier.

(E) OTHER SECTIONS OF INTERSTATE COMMERCE ACT NOT APPLICABLE

Section 2 (Ch. 91, 41 Stat. 479) defines and prohibits unjust discrimination on the part of the carrier. Section 3 (Ch. 104, 24 Stat. 380) prohibits undue or unreasonable preference or advantage being given by a carrier. To indict the carrier for violation of either section would throw on the Government the impossible burden of alleging and proving that the discrimination was unjust, or that the preference or advantage was undue or unreasonable.

In *Hocking Valley* v. *United States,* 210 Fed. Rep. 735, 743, Circuit Judge Denison, in affirming the order of the District Court in the case already cited, said:

> By omitting the limiting words "undue and unreasonable," in its denouncement of discrimination, the Elkins Act has avoided the contention that such a limitation was too vague to be the basis of criminal prosecu-

tions, in which, upon the same facts, one jury might acquit and another might convict.

Section 10* (Ch. 382, 25 Stat. 858) is likewise inapplicable as it relates to freight rates only and not to service (*United States* v. *Hanley*, 71 Fed. Rep. 672).

In *United States* v. *Metropolitan Lumber Co.*, 254 Fed. Rep. 335, 339, 343, District Judge Haight further said:

> By section 10 (Comp. St. 1916 § 8574) a criminal liability was imposed upon any *common carrier* who should willfully do or cause to be done, or suffer or permit to be done, "any act, matter or thing in this act

---

*"Section 10 * * *.

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

prohibited or declared to be unlawful, or who shall aid or abet therein," etc. By the same section, as amended by the Act of March 2, 1889, c. 382, § 2, 25 Stat. 855, it was made a criminal offense for a carrier "by means of false billing, false classification, false weighing or false report of weight, or by any other device or means," to knowingly and willfully assist or suffer or permit any person to obtain transportation for property "at less than the regular rates then established," on the line of transportation of such carrier. The same section, as amended by the act last mentioned, also provided that any one for whom, as "consignor or consignee," property should be carried by a common carrier, who should knowingly and willfully, "by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier," obtain or attempt to obtain transportation for such property "at less than the regular rates then established," should be guilty of a crime, as should likewise any person who should, "by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier * * * to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property."

It will thus be noted that, while the law made it unlawful and criminal for a *carrier* to give any unreasonable preference or advantage or to subject any person to an unreasonable prejudice or disadvantage in respect to transportation over its lines, and quite comprehensively prohibited and provided penalties for discrimination in the matter of compensation for transportation and from departing from the filed and published tariffs, it did not prohibit the receipt of discriminations in respect to transportation service, strictly speaking, by the shipper, nor make it criminal for him to accept transportation at a less compensation than was charged to others for a like service, or at less than the published tariffs, except when accomplished by false billing or bribery or something akin thereto, mentioned in section 10. In this condition of the law, the Elkins Act, which has been well described as " a ' catchall ' provision for any practice by either carrier or shipper which by any devise whatever would tend to defeat the purpose of the law " (*United States* v. *Vacuum Oil Co.*, 153 Fed. 604 (D. C. W. D. N. Y.) was passed.

* * * * *

Bearing in mind the purpose which Congress had in mind in enacting the Elkins Act, as before set forth, and considering, as will be hereafter shown, that a construction such as defendants urge would in many cases defeat that purpose, and further bearing in mind that one of the ways in which it

was sought to eliminate all favoritism and inequality of treatment was by visiting criminal punishment on those who would be the beneficiaries thereof, it would be unjustifiable, I think, in the absence of language from which it can be clearly found, to attribute to Congress an intention to limit the operation of the act to only such transactions as are consciously participated in by both the shipper and the carrier. Such a construction would free from criminal responsibility both the carrier and the shipper in all those cases where the shipper could, without the knowledge of the carrier, secure advantages and discriminations in transportation service, by means which do not fall within the provisions of section 10 of the Act to Regulate Commerce, as it was amended by the Act of March 2, 1889, c. 382, §2, 25 Stat. 855, and the Act of June 18, 1910, c. 309, §10, 365 Stat. 539. The provisions of that section, except as to the acts interdicted in the last paragraph, deal only with the procuring of transportation at less than the established rates. The last paragraph seems clearly to deal only with cases in which the carrier knowingly participates, or in which an attempt is made to secure the discrimination by means which would acquaint the carrier with the object sought. The language of that paragraph is:

"If any * * * person * * * shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce"

any carrier to discriminate in its favor. Under the settled rule of construction, the word " otherwise " should be construed to include offenses which are akin to those specifically mentioned; that is to say, bribery and solicitation, both of which would, of course, necessitate acquainting the carrier with the object sought to be accomplished. The use of the word "induce" would also seem to lead to the same conclusion. Hence, section 10, as amended and supplemented, would not cover cases such as these or many others which may be readily imagined. Moreover, if it was intended to cover, by section 1 of the Elkins Act, only the receipt of discriminations which are granted with the carrier's knowledge, that part of the act was quite unnecessary, because it was for all practical purposes already covered by the last paragraphs of section 10 of the Act to Regulate Commerce. It was held by the Circuit Court of Appeals of the Sixth Circuit, in *Nichols & Cox Lumber Co.* v. *United States*, 212 Fed. 588, 590, 129 C. C. A. 124, that the amendment made to that section by the Act of June 18, 1910, did not repeal the Elkins Act, because they were aimed at different evils.

(F) THE ELKINS ACT IS APPLICABLE

The Elkins Act is applicable and the facts charged constitute a violation thereof. If the facts charged are not reached by the Elkins Act, then the appellees go hence without day. It is the one or the

other. There is no other statute to which the Government may turn to reach the reprehensible acts. The Government must stand or fall on the Elkins Act.

CONCLUSION

In each case the judgment should be reversed and the cause remanded with directions to overrule the demurrer.

WILLIAM D. MITCHELL,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
WILLIAM H. BONNEVILLE,
Special Assistant to the Attorney General.

FEBRUARY, 1926.

APPENDIX A

SERVICE ORDER NO. 23

At a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 25th day of July, A. D. 1922.

It appearing, in the opinion of the Commission that an emergency which requires immediate action exists upon the lines of each and all the common carriers by railroad subject to the Interstate Commerce Act, east of the Mississippi River, including the west bank crossings thereof, and because of the inability of said common carriers properly and completely to serve the public in the transportation of essential commodities. *It is ordered and directed:*

1. That each such common carrier by railroad, to the extent that it is currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway shall give preference and priority to the movement of each of the following commodities: food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil.

2. That to the extent any such common carrier by railroad is unable under the existing interchange and car service rules to return cars to its connections promptly, it shall give preference and priority in the movement, exchange, interchange and return of empty cars intended to be used for the transportation of the commodities specially designated in paragraph numbered 1 hereof.

3. That any and all such common carriers by railroad which serve coal mines whether located upon the line or lines of any such railroad or customarily dependent upon it for car supply, herein termed coal-loading carriers, be, and they are hereby, authorized and directed whenever unable to supply all uses in full, to furnish such coal mines with open-top cars suitable for the loading and transportation of coal, in preference to any other use, supply, movement, distribution, exchange, interchange, or return of such cars; *provided,* that the phrase " suitable for the loading and transportation of coal " as used in this order shall not include or embrace flat (fixed) bottom gondola cars with sides less than 36 inches in height, inside measurement, or cars equipped with racks, or cars which, on July 1, 1922, had been definitely retired from service for the transportation of coal and stenciled or tagged for other service.

4. That all such common carriers by railroad other than coal-loading carriers, herein termed noncoal-loading carriers, be, and they are hereby, authorized and directed to deliver daily to a connecting coal-loading carrier or carriers, or to an intermediate noncoal-loading carrier, for delivery through the usual channels to a coal-loading carrier or carriers, empty coal cars up to the maximum ability of each such noncoal-loading carrier to make such deliveries and of each such connecting coal-loading carrier to receive and use the coal cars so delivered for the preferential purposes herein set forth.

5. That all such common carriers by railroad be, and they are hereby, authorized and directed to dis-

continue the use of cars suitable for the loading and transportation of coal, for the transportation of commodities other than coal, so long as any coal mine remains to be served by it with such cars; and as to each noncoal-loading carrier, so long as deliveries of any such cars to connecting carriers may be due or remain to be performed under the terms of this order.

6. That all such common carriers by railroad be, and they are hereby, authorized and directed, to place an embargo against the receipt of coal or other freight transported in open-top cars suitable for coal loading, by any consignee, and against the placement of such open-top cars for consignment to any consignee, who shall fail or refuse to unload such coal or other freight so transported in coal cars and placed for unloading, within 24 hours after such placement, until all coal or other freight so transported in coal cars and so placed has been unloaded by such consignee and shall notify the Commission of such action. This authorization and direction as to embargoes shall not interfere with the movement of coal to tidewater or the Great Lakes for transshipment by water, nor shall it apply where the failure of the consignee to unload is due directly to errors or disabilities of the railroad in delivering cars.

7. That in the supply of cars to mines upon the lines of any coal-loading carrier, such carrier is hereby authorized and directed, to place, furnish, and assign such coal mines with cars suitable for the loading and transportation of coal in succession

as may be required for the following classes of purposes, and in following order of classes, namely:

Class 1. For such special purposes as may from time to time be specially designated by the Commission or its agent therefor. And subject thereto:

Class 2. (a) For fuel for railroads and other common carriers, and for bunkering ships and vessels; (b) for public utilities which directly serve the general public under a franchise therefor, with street and interurban railways, electric power and light, gas, water, and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human foodstuffs; hospitals; (c) for the United States, state, county, or municipal governments, and for their hospitals, schools, and for their other public institutions—all to the end that such common carriers, public utilities, quasi-public utilities, and governments may be kept supplied with coal for current use for such purposes, but not for storage, exchange, or sale. And subject thereto:

Class 3. (As to each coal-loading carrier which reaches mines in Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee, and Alabama.) For bituminous coal consigned to any Lake Erie port for transshipment by water to ports upon Lake Superior. And subject thereto:

Class 4. (As to all such common carriers by railroad.) Commercial sizes of coal for domestic use. And subject thereto:

Class 5. Other purposes.

No coal embraced in Classes 1, 2, 3 or 4 shall be subject to reconsignment or diversion except for some purpose in the same class or a superior class in the order of priority herein prescribed.

8. That all rules, regulations and practices of said common carriers by railroad with respect to car service as that term is defined in said act are hereby suspended so far as they conflict with the directions hereby made.

9. That this order shall be effective from and after July 26, 1922, and shall remain in force until the further order of the Commission.

10. That copies of this order be served upon the carriers hereinbefore described, and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 5.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

APPENDIX B

SERVICE ORDERS

Service Order No.	Date effective	Subject	Cancellation effective
	1920		
1	May 20	Rerouting freight to expedite movement regardless of routing instructions. Rates applicable, however, are rates in effect at date of shipment over route designated.	Dec. 21, 1920
2	May 20	Relocation of some 30,000 coal cars from western roads to eastern roads.	Automatically
3	May 20	Relocation of some 20,000 empty box cars from eastern to western roads.	June 24, 1920
4	May 28	Texas carriers directed to unload 27,000 cars of grain.....	Automatically
5	June 13	Preference and priority for pooled over nonpooled coal to Lake Erie ports for transshipment by water, en route to the Northwest.	Apr. 12, 1921
6	June 24	Tidewater coal to New England—rescinded by Service Order No. 11.	Aug. 1, 1920
7	June 21	Carriers east of Mississippi River directed to furnish preferentially coal mines with open-top cars, amended by Service Order No. 9 and superseded by Service Orders 15 and 16.	July 13, 1920
8	July 1	Coal for Philadelphia Electric Co.....	July 15, 1920
9	July 21	Amendment to Service Order No. 7 requires "coal cars" shall not include flat gondola cars with sides less than 38 inches. Superseded by Service Orders 15 and 16.	Sept. 18, 1920
10	July 26	Preference and priority in supply of cars for and in transportation of bituminous coal for Northwest.	Apr. 12, 1921
11	Aug. 2	Tidewater coal to New England. This order indefinitely suspended by amendment September 17, 1920, the New England situation apparently having been measurably relieved.	Apr. 12, 1921
12	Aug. 10	Orders discontinuance Service Order No. 9 for 90 days. Superseded by Service Orders 15 and 16.	Sept. 18, 1920
13	Aug. 24	Carriers at Galveston, Tex., authorized to remove and store grain held in cars to release equipment.	Dec. 31, 1920
14	Aug. 25	Supply and distribution of open-top cars to wagon mines. Rescinded by Service Order No. 17.	Sept. 18, 1920
15	Sept. 19	Carriers east of Mississippi River to furnish mines with open-top cars suitable for loading and transporting coal in preference to any other use, provided that such "coal cars" (which shall not include or embrace flat-bottom gondola cars with sides less than 38 inches in height, inside measurement, or cars equipped with racks, or cars which on June 20, 1920, had been definitely retired from the coal service) may be used for freight moving in direction of mines upon a road not materially out of line and to points not beyond such mines. Also that noncoal-loading carriers within such territory shall deliver daily to connecting coal-loading carriers empty or loaded coal cars to their maximum ability. (S. O. 15 and 16, superseding Nos. 7, 9, and 12.)	Oct. 14, 1920

SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1920		
16	Sept. 19	All carriers east of Mississippi River authorized to furnish cars to mines for transporting coal, in addition and without regard to existing ratings and distributive shares, upon written application showing that such coal is needed solely for current use of public utilities, water and sewer works, schools, hospitals, State or municipal governments, etc. (S. O. 15 and 16, superseding Nos. 7, 9, and 12.)	Oct. 14, 1920
17	Sept. 19	Supply and distribution of open-top cars to wagon mines; ordinarily cars not to be furnished to wagon mines which customarily do not load open-top cars within 24 hours of placement.	Mar. 6, 1921
18	Oct. 1	Private cars and cars placed for railroad fuel loading to be designated as "assigned" cars. All others "unassigned" cars.	Mar. 24, 1921
19	Oct. 1	Preference and priority in transportation of coal commandeered by Navy.	
20	Oct. 15	Supersedes Service Order No. 15. Extends territory outlined in that order to eastern boundary of States of Montana, Wyoming, Colorado, and New Mexico.	Nov. 29, 1920
21	Oct. 15	Supersedes Service Order No. 16. Carriers east of Montana, Wyoming, Colorado, and New Mexico are authorized and directed to place, furnish, and assign cars to coal mines so that public utilities in that territory shall not suffer for lack of fuel.	Nov. 24, 1920
	1922		
22	July 26	Routing freight to expedite movement without regard to routing instructions. Rates applicable, however, are rates in effect at date of shipment over route designated.	Apr. 22, 1923
23	July 26	Carriers east of Mississippi River directed to give priority in movement to food for human consumption, feed for livestock, livestock, perishable products, coal, coke, and fuel oil; empty cars intended for transporting foregoing commodities; open-top cars (with sides less than 36 inches high) suitable for loading and transporting coal; that noncoal-loading carriers shall deliver daily to connecting coal-loading carriers empty coal cars to their maximum ability; that coal cars shall be used exclusively in coal trade so long as any coal mine remains to be served; that coal cars must be released within 24 hours after placement; that cars be placed for loading coal according to specific classes. Superseded by Service Order No. 25.	Sept. 20, 1922
24	Sept. 1	Carriers west of Mississippi River directed to give priority in movement to food for human consumption, feed for livestock, livestock, perishable products, fuel, etc., and empty cars intended for transporting foregoing commodities.	Dec. 11, 1922
25	Sept. 20	Supersedes Service Order No. 23. This order designates as coal-carrying cars, cars with sides 42 inches in height; permits the use under certain conditions of open-top cars for the movement of specified commodities, and eliminates the special classes of industries enumerated in Service Order No. 23 to receive coal.	Dec. 11, 1922

SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1922		
26	Nov. 22	Coal for Commonwealth of Virginia	Dec. 6, 1922
27	Nov. 28	250 cars ordered placed at Elkhorn Piney Coal Manufacturing Co., at rate of 30 cars per day, account of threatened destruction of stock pile by fire.	
28	Dec. 1	Coal for Commonwealth of Virginia, 4 cars per day for 10 consecutive working days.	
29	Dec. 2	Missouri Pacific R. R. directed to place 40 cars per day for 10 consecutive days at mines in the so-called Spadra district; also 10 cars per day for 5 consecutive days, to the Bernice Mines.	
30	Dec. 12	Car supply for Shreve Run mine of James M. McIntyre & Co., 10 cars daily for 10 consecutive working days; and Kearney-Barnett mines of Jos. E. Thropp, 4 cars daily for 15 consecutive working days, to be consigned to U. S. Army.	
31	Dec. 20	Car supply for Commercial Coal Mining Co., at Twin Rocks, Pa., 3 cars daily for 15 consecutive working days, to be consigned to Government Fuel Yards, Washington.	
32	Dec. 30	Car supply for certain mines on Chesapeake & Ohio Ry. and Pennsylvania R. R. for coal consigned to Government Fuel Yards, Washington.	
	1923		
33	Jan. 6	Car supply at certain mines on West Virginia Northern, Indian Creek Valley, and Baltimore & Ohio R. R. for coal consigned to supply officer of U. S. Navy, shipments to be at rate of 5 cars daily for 27 consecutive working days.	
34	Jan. 6	Car supply at Latrobe, Pa., mines for coal consigned to U. S. Army Quartermaster, shipments to be 8 cars daily for 15 consecutive working days.	
35	Jan. 15	Car supply at certain mines on Norfolk & Western for coal consigned to U. S. Navy Yard, Portsmouth, Va., shipments to be 8 cars daily for 10 consecutive working days.	
36	Jan. 15	Car supply at certain mines on Pennsylvania R. R., Johnstown & Stony Creek R. R., for coal consigned to Government Fuel Yards, Washington, for 10 consecutive working days.	
37	Jan. 18	Controversy between Minneapolis & St. Louis R. R. and Peoria & Pekin Union Ry. over terms under which Peoria & Pekin shall interchange freight traffic between M. & St. L. and connecting carriers at and in vicinity of Peoria, Ill.	July 12, 1924
38	Feb. 9	Car supply for Montevallo Mining Co., Aldrich, Ala., for coal for domestic purposes.	Feb. 26, 1923
39	Mar. 5	Docking vessel "Maumee" at New Haven, Conn., so coal may be promptly forwarded to Springfield Gas Light Co., Springfield, Mass.	

SERVICE ORDERS—Continued

Service Order No.	Date effective	Subject	Cancellation effective
	1924		
40	Apr. 1	Kansas City Terminal Ry. Co. required to permit Missouri-Kansas-Texas R. R. Co. to use Union passenger station and other terminal facilities at Kansas City, Mo.	
	1925		
41	Aug. 8	Missouri Pacific directed to route certain traffic via Ferriday, La., and Texas & Pacific, by reason of damage to incline at Vidalia, La.	Sept. 8, 1925
42	Dec. 4	To facilitate movement, Seaboard Air Line Ry. authorized to forward freight traffic via Brooksville & Inverness Ry. in Florida.	
43	Dec. 28	To expedite movement, carriers directed to transport freight, consigned to Florida, via most available routes without regard to routing instructions.	

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CONTENTS

CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 216

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

THE P. KOENIG COAL COMPANY

No. 217

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

MICHIGAN PORTLAND CEMENT COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY BRIEF FOR THE PLAINTIFF IN ERROR

I

Opposing counsel argue (No. 217, Br. 27) that Service Order No. 23 prescribes "classes of purposes" and "order of classes" only with respect to car service, that the Commission had no delegated power, at the time alleged, to fix preferences and priorities in car service, and that defendant

in error did not obtain a discrimination, concession or advantage in transportation.

Opposing counsel argue (No. 217, Br. 1) that counsel for the Government have failed to refer to the point raised by paragraph 3 of the demurrer, that is to say: (No. 217, R. 40)

> (3) Service order No. 23, particularly paragraph 7 thereof, makes no rules, regulations or practices applicable to the transportation of coal for different classes of purposes and different order of classes, said order being applicable only to car service, which does not denote or connote transportation.

They argue that Service Order No. 23 " directs the carriers to give preference, and priority in *movement,* among other things, to coal, not according to any preferred uses or purposes, but generally and only as a commodity (italics ours)," and " The directions given and the restrictions attempted to be imposed by paragraph 7 relate only to car service, to the placing, furnishing and assigning of cars which are suitable for the loading and transportation of coal " (No. 217, Br. 28).

Section 402 of the Transportation Act of 1920, paragraph (15), which amended Section 1 of the Interstate Commerce Act (Ch. 91, 41 Stat. 476), provides:

> (15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requir-

ing immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d)

> (10) The term "car service" in this Act shall include the *use, control, supply, movement, distribution,* exchange, interchange, and *return* of locomotives, *cars,* and other vehicles *used in the transportation of property,* including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act (italics ours).

Section 400 of the Transportation Act of 1920, paragraph (3), which amended paragraph 1 of the Interstate Commerce Act (Ch. 91, 41 Stat. 475), provides:

> * * * The term "*transportation*" as *used in this act shall include* locomotives, *cars,* and other vehicles, vessels, *and all instrumentalities and facilities of shipment or carriage,* irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, *and handling of property transported* * * * (italics ours).

Reading the paragraphs together, they are all-comprehensive and indicate clearly the Congressional intent not to deal with *car service* and *transportation* as separate and independent subjects. There are sound reasons for this. One is that in the very nature of things transportation includes the cars. Without cars there can be no transportation. Shortage of cars means shortage of transportation. There is no inconsistency in priority in

transportation and priority in car service. Priority in transportation begins with the priority in the placement of empty cars. There could be no priority in transportation of food for human consumption, flour, for instance, if the cars that were furnished were loaded with automobiles. Another reason is that to divide the subjects would result in a senseless construction which the courts will not favor. The frail contention that *car service* and *transportation* are unrelated subjects, that the Commission may not give priority in transportation by regulating the distribution and loading of cars at the mines, falls of its own weight. The theory of opposing counsel appears to be, that the distribution and loading of the cars are separate and apart from, and have no connection with, the movement of the cars on their forward journey.

The Commission had the power to suspend the car service rules and to direct others in lieu thereof. It did so. That the cars were placed and loaded for movement and were not to remain standing may be assumed. The statute does not require that there shall be one order to place the cars and another to move them. The placement of the cars at the mines was an integral part of the transportation under the statute, and as much so as the movement thereof from West Virginia and Kentucky to Detroit.

Peoria & Pekin Union Railway v. *United States*, 263 U. S. 528, 532, is cited (No. 217, Br. 29). In that case it was held that the authority conferred upon the Commission, under the emergency clause,

to issue orders in certain cases, if it finds that an emergency exists, does not sustain an order, so issued, requiring a terminal carrier to " switch " by its own engines and over its own tracks, freight cars intended by or for another connecting carrier.

It is true that in *Peoria & Pekin Union* v. *United States*, 263 U. S. 528, 533, this Court said, " But ' car service ' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of subparagraphs *a*, *b*, and *c*."

This is far from saying that, under the statute, the Commission is without power, in emergencies, to regulate the use of *all* of the instrumentalities of transportation, regardless of ownership, under subparagraphs a, b, and c. In that case, the sole question related to " power to require the *performance* of the transportation service," and " the switching order here in question compels *performance* of the primary duty to receive and transport cars of a connecting carrier " (italics ours). That opinion does not impair the power of the Commission under sub-paragraph (a) to suspend the operation of all existing rules and was never so intended.

Moreover, the opinion in *Peoria & Pekin Union* v. *United States, supra*, makes no reference whatever to sub-paragraph (d) except the statement

that " the order can not be justified as dealing *with preferences in transportation* or embargoes under sub-paragraph (d) " (italics ours) (263 U. S. 532). Why? Because *performance* of the transportation service as between two carriers in that case is a subject very different from *priority of transportation* in the instant case. Service Order No. 23 followed (a), (b), and (d). There was no occasion to take any action under paragraph (c) which relates to joint or common use of terminals.

Defendant in error argues that power to make the order is not conferred by subdivision (d) of Paragraph (15) because " preference or priority in transportation " assumes that the cars are awaiting movement after having been distributed and loaded. That argument overlooks the broad meaning of the word " transportation " as used in Section 1, paragraphs (3) and (10) of the Interstate Commerce Act, *supra.*

In *Arlington Heights Fruit Exchange* v. *Southern Pacific Company,* 20 I. C. C. 106, 117, it was held that transportation includes the furnishing of cars (see also *United States* v. *Baltimore & Ohio R. R. Co.,* 165 Fed. Rep. 113, 121; *Swift & Company* v. *Hocking Valley Ry. Co.,* 93 Ohio State, 143, 148). It follows that authority to give directions for priority in transportation includes authority to give directions for priority in placement of cars.

The argument that Congress granted the Commission the emergency power to suspend the rules, regulations and practices in respect to car service

(which includes the use, supply, distribution and return of coal cars), and did not give the Commission the emergency power to issue in lieu thereof, priority orders for such use, supply, and distribution of coal cars, imputes to Congress a useless and senseless course and defeats the very purpose of the emergency power.

In *Baltimore & Ohio Railroad* v. *Lambert Run Coal Company*, 267 Fed. Rep. 776, the United States Circuit Court of Appeals for the Fourth Circuit (Circuit Judges Pritchard, Knapp, and Woods) held that the Commission, under sub-paragraph (d), had the emergency power to issue preference and priority orders in the distribution of cars to coal mines. In delivering the opinion Circuit Judge Woods said (267 Fed. Rep. 780):

> The Congress has not, however, conferred on coal mines equality among themselves—the right of each mine in time of coal-car shortage to be furnished cars in proportion to mine ratings, without regard to the public welfare and safety. Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation, and unexpected needs of the public, which can not be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate

distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

We think the Congress has clearly conferred on the commission the power to grant relief in such conditions, by providing that (quoting subparagraph (d))—

The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long-existing car shortage. But, recognizing the necessity of a degree of flexibility, the Congress conferred upon the commission power, in case of a car shortage which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings, with preference and priority to such extent as will in its opinion meet the emergency.

All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the commission when they find an emergency requiring it. Our conclusion is that the making and promulgation of rule 8 as amended was clearly within the power of the commission.

The opinion of the Circuit Court of Appeals expressed the views of the three eminent judges who concurred. The opinion is none the less persuasive because the decree was reversed on other grounds.

II

Knowing that the Elkins Act refers to the transportation of property only, and not to the carriage of passengers, opposing counsel, in referring to the illustration of the District Court, "the hobo who steals a ride on the 'bumpers' of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession 'given' him, though not knowingly," state it "is only one of many such illustrations that can be given" (No. 217, Br. 6, 7). They undertake to add illustrations with respect to the carriage of freight, e. g. "If a man, by force, seizes a railroad company's locomotive and hauls a car of freight from the company's yard to his factory, he, while guilty doubtless of a serious crime, is not violating the Elkins Act. Or if a man ships in interstate commerce intoxicating liquor to himself and then in a lonely place holds up the train and retakes possession of his property, is he to be punished under the Act?" Passing the comment of the late Chief Justice White on similar arguments at the Bar, "But these extreme suggestions have no relation to the case in hand" (206 U. S. 1, 25), attention is called to the case of *Illinois Central Railroad Co.* v. *Messina,* 240 U. S. 395, which involved the construction and application of the anti-pass provision of the Hepburn Act. By Section 1 of the Act of February 4, 1887, Ch.

104, 24 Stat. 379, as amended by the Act of June 29, 1906, Ch. 3591, 34 Stat. 584, and still in force, any common carrier violating the provisions against free transportation of persons is guilty of a misdemeanor and subject to a penalty, and any person other than those excepted " who uses any such interstate * * * free transportation " is made subject to a like penalty.

Messina sued for personal injuries suffered while upon a train running from Mississippi to Tennessee. He had paid no fare but was upon the tender, as he said, by permission of the engineer. In a wreck Messina was caught between the tender and a car and injured. The Supreme Court of Mississippi sustained the judgment which this Court reversed because the trial judge refused to instruct the jury that the engineer had no authority to permit the plaintiff to ride on the train " at the place he was in," but the request for this instruction was based upon the company's rules, not upon the Act to Regulate Commerce. The Supreme Court of Mississippi discussed the act of Congress but held that it did not apply to the case. In reversing the judgment, this Court, speaking through Mr. Justice Holmes, said (240 U. S. 397):

> The word " such " like " said " seems to us to indicate no more than that free transportation had been mentioned before. We can not think that if a prominent merchant or official should board a train and by assumption and an air of importance should obtain

> free carriage he would escape the Act. We are of opinion therefore that the Act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal.

The principle announced in the *Messina Case* is precisely the principle which we seek to maintain here. It was held that the Judge should have instructed the jury that the engineer had no authority to permit Messina to ride on the tender in view of the antipass provision. In that case, this Court has sanctioned the principle that it is not necessary for the company and the passenger or shipper to cooperate to bring about a violation of the statute.

III

Opposing counsel, in referring to the opinion of this Court in *Missouri, Kansas & Texas Railway* v. *Harriman,* 227 U. S. 657, 671, states that the reference to the Elkins Act " was not made in view of any relevant contention," and " the dictum of Justice Lurton did not deal with a material or even litigated point and was not intended as a deliberative statutory construction " (No. 216, Br. 25, 26). Opposing counsel also argue that the case " was a civil case and the excerpt quoted therefrom appears

to be an inadvertence in reference by the Court" (No. 217, Br. 24). But an examination of that case will disclose that this point was argued (227 U. S. 662) and the language of Mr. Justice Lurton was not *dictum* but was squarely within the issues drawn by the parties.

Counsel further say that the quotation from the Government's brief stopped short of the last sentence of the paragraph, which is "We see no ground upon which this contract can be held upon its face to have offended against the statute." But the *statute* to which Mr. Justice Lurton in that sentence referred was the Carmack Amendment and not the Elkins Act at all.

Two pages earlier he made a similar reference to the Carmack Amendment, "Nor is there anything upon the face of this contract, when read in connection with the rate sheets referred to therein, * * * which offends against the provisions of the twentieth section of the act of June 29, 1906." The shipper had placed a low value on certain very valuable "show cattle" in order to gain the advantage of the lower rate and signed a contract accordingly. The cattle were loaded by the shipper and were never seen by the company's agent, nor was it claimed that he was ever informed of the value or quality of the cattle to be shipped. By a negligent derailment the cattle were killed and the plaintiff recovered their full value, $10,640, in the

State court. From beginning to end, the plaintiff claimed that the contract which he had so executed was "a contract of exemption forbidden by the Hepburn Act of June 29, 1906, being the Carmack Amendment of the twentieth section of the general act to regulate commerce of February 4, 1887, Ch. 104, 24 Stat. 379" (227 U. S. 667, 668). That was the statute to which Mr. Justice Lurton referred in the sentence above quoted.

Defendants in error cannot escape or argue away (No. 216, Br. 25, No. 217, Br. 24) this Court's opinion in *Missouri, Kansas & Texas Railway* v. *Harriman, supra.* Speaking through Mr. Justice Lurton, this court meant exactly what it said, i.e. (p. 671):

> If he (the shipper) knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708).

In the Harriman case there was no unlawful act on the part of the carrier because its agent had neither seen the particular cattle shipped, nor been informed of their value or quality. The undervaluation of the cattle by the shipper for the purpose of obtaining a lower rate was the seeking and the obtaining of an advantage by the shipper. Under the clearly stated facts in that opinion Justice Lurton held, (1), that the contract of carriage,

which set out the maximum value of the cattle and the rate applicable for the transportation of cattle of that maximum value, did not offend against the Carmack Amendment to section 20 of the Interstate Commerce Act; and, (2), that a shipper who knowingly declares an undervaluation of the property for the purpose of obtaining the lower of two published rates (dependent upon the valuation of the property) thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act, and this even when the carrier is not informed of the value of the property.

IV

Opposing counsel maintain (No. 217, Br. 15) that the second "whereby clause," namely, "or whereby any other advantage is given or discrimination is practiced," does not refer to the first "whereby clause," namely, "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs * * *." But the second "whereby clause" must be read in connection with the first "whereby clause" as well as in connection with the prohibition against rebates, concessions, or discriminations. The "device" is not restricted to rebates. A device used in obtaining a concession is also prohibited, and such is the interpretation given by District Judge Hazel in *United States* v. *Vacuum Oil Co.*, 153 Fed. Rep. 598, 604:

> The word *"concession"* does not appear in the earlier acts to regulate commerce, but is used for the first time in section 1 of the Elkins Act, which is apparently a "catch-all" provision for any practice by either carrier or shipper which *by any device whatever* would tend to defeat the purpose of the law (italics ours).

To the same effect, where unlawful *discriminations* were received in the placement of coal cars at mines during a coal car shortage, *by a device,* and where rebates were not involved, see *Dye* v. *United States,* 4th C. C. A., 262 Fed. Rep. 6, 7.

Although opposing counsel argue (No. 217, Br. 8–15) that the Elkins Act is applicable and effective only when a published tariff is violated, it should be noted that not one case has been cited to substantiate that proposition. The broader interpretation given the Elkins Act by the courts is well illustrated in *Vandalia Ry. Co.* v. *United States,* 226 Fed. Rep. 713, where a loan by a carrier to shipping interests at less than the market rate was held to be an unlawful concession. In *C. C. C. & St. L. Ry.* v. *Hirsch,* 204 Fed. Rep. 849, and in *Central of Georgia* v. *Blount,* 238 Fed. Rep. 292, leases of property by carriers to shippers at inadequate rentals were held to be such unlawful concessions. In *Northern Central Railway* v. *United States,* 241 Fed. Rep. 25, the waiving of royalties for the use of coal lands leased to shipping interests was held to be such an unlawful concession. In *Pennsyl-*

vania Railroad v. *Puritan Coal Co.*, 237 U. S. 121, and *Pennsylvania Railroad* v. *Stineman Coal Co.*, 242 U. S. 298, this court held that where a carrier has promulgated rules for the distribution of coal cars to shippers and it departs from those rules to the prejudice of one or more shippers the carrier has practiced unlawful discrimination. That the Elkins Act makes unlawful the granting of discriminations by any device when coal car distribution rules promulgated by the Commission are violated, and where no tariffs are concerned, see *Dye* v. *United States*, 262 Fed. Rep. 6.

Opposing counsel (No. 216, Br. 19) quotes from the concurring opinion of Circuit Judge Baker in *Standard Oil Company of Indiana* v. *United States*, 164 Fed. Rep. 376 (7th C. C. A.). But the point here involved was not raised or passed upon in that case and Judge Baker's remarks were not directed to it. The point discussed by Judge Baker was whether the defendant in that case could *knowingly* receive a concession when it had no knowledge of the lawful rate; whether it intended to receive a concession and thereby violate the law when it was ignorant of the legal rate. The language of Judge Baker, quoted by opposing counsel, immediately followed his statement in support of the proposition that the shipper could not properly be convicted unless it "either actually knew that it was accepting and receiving

a concession or wilfully and intentionally ignored facts and circumstances known to it which would have led to such knowledge." That proposition has no relevancy whatever to the contention of the defendant here under consideration.

District Judge Mayer's opinion in *United States* v. *Lehigh Valley Railway Co.*, 254 Fed. Rep. 332, cited by opposing counsel (No. 216, Br. 22), does not hold that an agreement between carrier and shipper is necessary before a violation of the Elkins Act occurs. The indictment alleged, in substance, that the railroad had not collected certain accrued and proper demurrage charges and that the shipper had not paid them. The court did not hold that there could be no concession within the meaning of the Elkins Act in the absence of an agreement or understanding between carrier and shipper.

The statute under which Service Order No. 23 was issued did not require the Commission to file it as a tariff. If the Commission had authority to issue such an order, then Service Order No. 23 had the force and effect of law. Rules and regulations promulgated by a Department of the Government under the legislative authority have the force of law and the violations may be punishable. *United States* v. *Grimaud*, 220 U. S. 506, *Avent* v. *U. S.*, 266 U. S. 127, 131. It was stated by this Court in

Pennsylvania R. R. Co. v. *International Coal Co.*, 230 U. S. 184, 197:

> The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike.

Cited with approval in *Swift & Co.* v. *Hocking Valley Railway*, 93 Ohio State, 143, 148.

V

The Emergency Coal Act (Sept. 22, 1922, 42 Stat. 1025) (No. 216, Br. 26; No. 217, Br. 32) was aimed at profiteers and was enacted, *inter alia*, for the purpose, as stated in section 2 thereof, and in Senate Report No. 895, 67th Congress, 2nd Session, "to prevent upon the part of any person, partnership, association, or corporation, the purchase or sale of coal or other fuel *at prices unjustly or unreasonably high*" (italics ours). There were some overlapping provisions as between the Emergency Coal Act and section 1 of the Interstate Commerce Act. Both statutes authorized the Commission to issue orders for priorities in *embargoes*. Because the Emergency Coal Act vested power in the Commission to issue priority orders in embargoes is no argument that the Commission did not already have that power. The penalty provision in the Emergency Coal Act likewise overlapped the penalty provisions in the Elkins Act.

VI

In each case the judgment should be reversed and the cause remanded with directions to overrule the demurrer.

WILLIAM D. MITCHELL,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
WILLIAM H. BONNEVILLE,
Special Assistant to the Attorney General.

MARCH, 1926.

CONTENTS

CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 216

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

THE P. KOENIG COAL COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE DEFENDANT IN ERROR

STATEMENT

The demurrer in this case placed in issue the construction of the Elkins Act, the construction of the emergency legislation authorizing Service Order No. 23 of the Interstate Commerce Commission, and var-

ious constitutional points. The decision of the court below sustaining the demurrer was limited to the first ground therein presented. As is stated in the opinion (page 54):

> "For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer."

The decision upon this appeal if in favor of the appellant is decisive only of the first ground urged in the demurrer, the construction of the Elkins Act; if the decision below is affirmed and the construction of the Elkins Act as made by the learned District Judge is deemed correct, there can be no occasion to consider the other points urged.

We assume generally that under these circumstances the only point at issue before this court is that upon which the decision below depended.

ARGUMENT

SUMMARY

I. The receipt of a concession or discrimination whereby an advantage is given or discrimination is practiced, necessarily involves the grant of a concession or the practice of a discrimination by the carrier, the existence of which acts by the carrier the indictment negatives. The question is primarily the meaning of the statutory language. The common and lexical meanings thereof exclude those for which the Government contends, and they confirm the construction made by the court below. That this is correct is corroborated by the Committee Report and the Congressional Debate.

II. The Government seeks a strained and novel construction not contemplated in those important cases in which the Elkin Act was enforced. (*New York, New Haven & Hartford v. Commission*, 200 U. S. 361; *Armour Packing Co. v. United States*, 209 U. S. 56; *Lehigh Coal & Navigation Co. v. United States*, 250 U. S. 556; *United States v. Union Stockyards*, 226 U. S. 286; *Standard Oil Co. of Ind. v. United States*, 164 Fed. 376; *North Central Railway Co. v. United States*, 241 Fed. 25.) Section 10 of the Act to Regulate Commerce defines in clear language the offense of fraud upon the carriers, and if it were the intention to include similar acts within the scope of the Elkins Act, it would have been simple and easy to use apt language thereto.

III. The learned District Judge correctly considered *United States v. Metropolitan Lumber Company*, 254 Fed. 335 to have been wrongfully decided.

IV. The gist of the offense here charged is a fraud upon the carriers and a violation of Service Order No. 23. It would have been competent for Congress to make violations of the Commission's rules a crime (*Avent v. United States*, 266 U. S. 127). Whatever omissions there may be in the penal sections of Section 402, Transportation Act of 1920, or in the Emergency Coal Act (Sept. 22, 1922, 42 Stat. 1025) cannot authorize this court to assume legislative functions and to apply the Elkins Act beyond the scope indicated by its language. The appeal to the sense of moral opprobrium to induce such action is not a legal argument and merits neither consideration nor response.

I.

THE RECEIPT OF A CONCESSION OR DISCRIMINATION WHEREBY AN ADVANTAGE IS GIVEN OR DISCRIMINATION IS PRACTICED NECESSARILY INVOLVES THE GRANT OF A CONCESSION OR THE PRACTICE OF A DISCRIMINATION BY THE CARRIER.

(a) The issue is the meaning of "concession or discrimination."

It is almost unnecessary to allude to the fact that a criminal statute cannot be given a construction which departs from the fair and ordinary meaning of its language. Unusual and speculative meanings are

not favored. Doubtful intendments are excluded, and only fair, plain and unforced meanings are included.

The statute deals with rebates, concessions or discriminations (a) Whereby property is transported in interstate commerce at a less rate than that named in the published tariffs; and (b) Whereby any other advantage is given or discrimination is practiced. The statute itself, by these two "whereby" clauses, so defines the words "rebate," "concession" and "discrimination" that we have considered it impossible for reasonable minds to disagree. But nevertheless that clear and obvious interpretation which Judge Tuttle has made, that to receive a concession whereby an advantage is given, or to receive a discrimination whereby a discrimination is practiced means to receive a special favor granted or practiced by the carrier, is disputed in this appeal. The consession spoken of in the statute is a grant or a boon given by the carrier, and the discrimination included therein is one which the carrier practices. The generic meaning of "concession" and discrimination" involves the voluntary departure from an accepted standard and the voluntary practice of favoritism by the carrier.

While it is not necessary to our argument that this court should hold that the word "concession" refers to a rate-cut, we think this is the true meaning of that word in carrier parlance. And we suggest that discrimination by the carrier in respect to service is included within the word, "discrimination." A "rebate" means, of course, the repayment of money. "Concession" refers to a price concession; and "discrimination" means preferential treatment by the carrier in respect to service. The elements of offense outlined by the statute all revolve about the central fact that the danger which is being guarded against

is that the carrier should make discrimination among shippers and should practice favoritism.

By the loose use of language counsel for the United States have attempted to use the word, "concession" to apply to what was not granted. They insist upon using this word to designate a resultant situation no matter how it came about, when in fact "concession" has the necessary connotation that it be the result of a favoring or granting mind.

It is a misuse of language to designate the shipments charged in the indictment as "a concession obtained by fraud" for the very point in issue is whether they were concessions or discriminations in any event. We may well concede that a concession does not change character merely because a fraud induced it. If a carrier grants me a rate-cut not allowed by the published tariffs because I fraudulently represent that I am a corporation of tremendous shipping business, the receipt by me thereof would be the receipt of what the carrier gave me—a concession in its very origin. The government's statement of the question misapprehends the essential issue, that the carrier must create the concession or practice the discrimination. The issue is merely the meaning of these words. The learned District Judge clearly apprehended this issue and in the argument below he propounded to the Government's counsel the following:

> "It will be helpful to me in the preparation of my opinion in this cause if you will kindly indicate to me the position of the Government as to the following questions:
>
> "1. What is the meaning of each of the following words, as used in the section of the Elkins Act here involved: (a) 'Concession';

(b) 'Discrimination'; (c) 'given'; (d) 'practiced'; (e) 'received'; (f) 'accept'?

"2. Do the words, 'given' and 'practiced,' as used in said section, mean respectively, (a) 'given by such carrier,' and (b) 'practiced by such carrier'?

"3. In what respects, if at all, is the following statement on page six of the brief of the defendant herein incorrect: 'In other words, if a person steals the transportation of a package, as would take place when the hobo transports his belongings on the rods, or when a person transports one commodity under a false billing, he would, according to the theory of the prosecution, be getting a concession'?

"4. Does the Government contend (a) that the decision in the case of *Missouri, Kansas & Texas Railway Company v. Harriman,* 227 U. S. 657, cited on page seven of its brief herein, is controlling authority in the present case and (b) that the language quoted from said cited decision on said page seven is not dictum?

"5. Do the acts of defendant charged in the indictment herein constitute the acceptance or receiving of a 'discrimination,' as distinguished from a 'concession'?

"6. If so, could defendant be convicted thereof under such indictment, which charges only the acceptance and receiving of a concession'?"

Government's Replies

1 and 2. The word "concession" as used in the Elkins Act implies a comparison with, a measurement by, and a departure from, a determined standard. (**Standard Oil Co. of Ind. v. United States**, 164 Fed. 376, 390.) In the case of concessions relating to the compensation of the carrier, the standard is the published tariff established in accordance with Section 6 of the Interstate Commerce Act. In the case of concessions in transportation service, the standard may be a car distribution rule, as in the **Puritan** case (237 U. S. 121) and the **Dye** case (262 Fed. 6 criminal); an embargo, as in the **Metropolitan Lbr. Co.** case (254 Fed. 336); or other rule, **Puritan** case. In the case at bar the standard is the service order of the Interstate Commerce Commission, which fixed the amount of transportation service to which all shippers were entitled.

A discrimination under the Elkins Act may relate to the compensation of the carrier, as where one shipper obtains a lower rate for a given transportation service than other shippers, or it may relate to any matter in connection with the receipt, transportation, or delivery of property or any service in connection therewith, and comes about where one shipper fares better at the hands of the carrier than another under like circumstances. (**C. & A. Ry. v. Kirby**, 225 U. S.

Defendant's Replies

(1) **"Concession."** This word is best defined by the language of the statute in which it is used. It is (a) A grant of an allowance from the published tariffs; (b) a grant of an advantageous favor (i. e., whereby an advantage is given).

"Discrimination." The practice of favoritism toward one, a limited number or a class, implying the withholding of such favors from the remaining;

"Give." To confer by voluntary act something upon or unto another.

"Practice." "Practiced" is defined in Webster's New International Dictionary as follows: "To do, perform, carry on, act, or exercise; now, except rarely, to do or perform often, customarily, or habitually; to make a practice of; to put into practice or action; to execute; as to **practice** gaming."

We add the following: To indulge in a use; to perform as a matter of conduct; to devote onesself to a certain conduct (usually of sinister connotation, i. e., to practice prostitution; to practice sabotage; to practice defamation; to practice discrimination).

"Receive," "Accept." In this connection we refer the Court to Webster's New International Dictionary under definition of the word "Take," at the synonyms therein set forth as follows: Take; Receive, Accept; **Take**, the general

155; **Penna. R. R. v. Puritan Coal Co.**, 237 U. S. 121; **Metro Lbr. Co. case, supra; Dye v. United States**, 262 Fed. 6.)

"Given" means given by the carrier and "practiced" means practiced by the carrier. But the words of the statute making it unlawful for any person "to offer, grant, or give or to solicit, accept or receive, any rebate, concession, or discrimination * * * whereby etc.," must be read in connection with the next succeeding sentence of the statute as follows:

"Every person or corporation, whether carrier or shipper, who shall, **knowingly**, offer, grant, or give, or solicit, accept, or receive any such rebate, concession or discrimination, shall be deemed guilty of a misdemeanor, * * *."

The word "knowingly" which we have underscored is important to a proper interpretation of the statute. Unless the carrier grants the concession knowingly it has not violated the statute. The same is true as to the receiving of the concession by the shipper. Manifestly the shipper cannot accept or receive a concession or discrimination from a carrier unless it is granted by the carrier, but it may be granted without knowledge on the part of the carrier of its character as a concession or discrimination. If so, the carrier can not be prosecuted. But if the concession is accepted and received by the shipper knowingly he is indictable and punword may not imply a tender or offer of that which is taken; to **Receive** is to take something which is offered or presented; to **Accept** is to receive with assent or approval, or in the spirit or under the terms of the offer.

(2) The words "given" and "practice," it is conceded by the Government, mean given by such carrier and practiced by such carrier. It is impossible as a matter of statutory construction to fail to give effect to these words. In fact they do only redundantly elaborate upon the meaning of the words "concession" and "discrimination," and they resolve any doubt or ambiguity concerning those words.

ishable, and the fact that the concession which the shipper knowingly accepts is granted by the carrier without the necessary knowledge does not operate as a bar to the prosecution of the shipper. This is fully developed in our reply brief and is, we think, amply supported by the cases cited therein.

3. If a person steals the transportation of a package or other property, i. e., if he knowingly obtains the transportation of property at less than the rates named in the tariffs, he violates the Elkins Act. The "hobo" example is not a good one for at least two reasons: (1) Because the Elkins Act does not apply to the transportation of persons, but only "in respect to the transportation of property"; (2) the stealing of the transportation of the package "on the rods" would not be obtaining a concession whereby the property is transported "at a less rate than that named in the tariffs published and filed" by the carrier because the carriers do not publish any rates for the transportation of packages in the hands of hobos "on the rods."

(3) The statements referred to in this question are incorrect but absolutely consistent with the theory of the prosecution. The hobo who transports his belongings upon the rods is not excluded from the operation of the Elkins Act because of his character as a hobo or because of the character of his belongings. The Elkins Act applies to the transportation of any property in interstate or foreign commerce. If the railroad consented that he should transport goods upon the rods there can be no question but that he is receiving the benefit of a discriminatory practice. Other shippers of goods must pay the transportation charges. But the theory of the Government is that a person receives a concession if he obtains an advantage in the transportation of property even though the advantage is not given to him by the carrier and the carrier has not conferred it upon him by a discriminatory practice. To be consistent, therefore, they must necessarily admit that the hobo so transporting his belongings, as stated in the

question, in interstate commerce, etc., becomes amenable to the penalties of the Elkins Act. Somehow they cannot face the verities of this proposition. The example illustrates, in fact, that the Elkins Act was not intended to apply to things other than rebates, concessions or discriminations which by force of these words and by force of the words "whereby an advantage is given or a discrimination is practiced," are things given as a result of intendment on the part of the carrier. The false billing case must, if the theory of the prosecution is not abandoned, constitute a violation of the Elkins Act. It does not, and the Government correctly takes the position that it does not. In the hobo case both the advantage which the hobo was receiving and also the fact of transportation at all were unknown to the carrier. In the false billing case the fact of transportation is known to the carrier but the fact of advantage is unknown to the carrier. There is no distinction in principle with reference to the Elkins Act in the two examples but the cases were mentioned, the first broad enough to cover unwitting transportation as well as unwitting advantage; the second example being limited to unwitting advantage. The second example in principle is absolutely indistinguishable from the instant case and the only thing that excludes it from the scope of the Elkins Act is the fact

that it cannot be said that a concession has been granted or that a discrimination has been practiced. The Government correctly states that the offense of obtaining a less rate than the published rate by reason of false billing or by any other device, whether with or without the consent and connivance of the carrier, is penalized by Section 10 of the Interstate Commerce Act. This section deals with acts closely relating in character to the act charged in this indictment. But the penalties are limited and to cases of obtaining advantageous rates.

4. The government does not urge that the decision in **Mo. Kans. & Tex. Ry. v. Harriman,** 227 U. S. 657, 671, an excerpt from which is quoted on page 7 of our original brief, is controlling authority in the present case. The court there held that the specific contract for transportation of cattle, which contract was in compliance with the lawful tariff rates, was not illegal under the Carmack amendment of Section 20 of the Act to regulate commerce. Although the language quoted may be regarded as dictum we think that the reasoning of Justice Lurton is sound, is in point in the instant case, and is persuasive.

(4) This question is sufficiently answered.

5 and 6. The acts of the defendant charged in the indictment constitute the acceptance and receipt of a concession whereby an advan-

(5) A strict construction of the meaning of the word "concession" limits it to obtaining a rate allowance. We have not insisted that

tage was given and a discrimination was practiced in favor of the defendant and against others. The indictment so charges; see paragraph 2 and 4 thereof. The language of the statute upon which we rely is: "* * * it shall be unlawful for any * * * corporation * * * to accept, or receive any * * * concession * * * in respect to the transportation of any property in interstate * * * commerce * * * whereby any * * * advantage is given or discrimination is practiced."

Concessions and discriminations are closely related. Where there are competing shippers if one received a concession from the determined standard and the other competing shippers do not receive such a concession, a discrimination results. The same act may therefore constitute a concession and a discrimination.

this was a necessary construction for the reason that we felt able to bring still stronger arguments to bear. It might with propriety be held that the word "concession" is limited to rate advantages, and other advantages are included in the term "discrimination." It is clear, however, that taking the words together they will include advantages both of rate and of service. If an indictment should set up in detail all of the elements, let us say, of the crime of murder, but should neglect to use the word "murder," we are inclined to think that such an indictment would nevertheless be sufficient to charge that offense. So too, if this indictment sets up all of the elements necessary specifying the acts and the intent to constitute the acceptance or receipt of a discrimination, we are inclined to think that it is not fatal that the pleader does not say that the acts done as aforesaid constitute a discrimination. In short we are inclined to think that an error not having a misleading effect in what is really a conclusion of the pleader, is not fatal to an indictment. For example, if a man were accused of an assault and all of the facts and intent constituting the assault were clearly set up but the pleader added that he thereby committed the offense of assault and battery, we think that sufficient notice of the offense is given

by the statement of the acts and intent which do in fact constitute it, and that his designation of the name of the offense is in the nature of a conclusion and is defective in form rather than in substance unless it should be found to have the effect of misleading the defendant. Although it may be true that we are too liberal in making this concession, still we think it but right to set forth the results of our thought on the matter regardless of the advantage to us.

(6) We have already indicated above our views as to the requirements in an indictment. The defect suggested we regard as a defect of form which by force of Revised Statutes No. 1025 cannot be relied upon unless it tends to the prejudice of the defendant.

(b) Committee report and history confirm the construction made by the court below.

We print as an appendix hereto the applicable Committee Report at the time of the passage of the Elkins Act. We have italicized such portions of the Report as have a bearing upon the construction of the Elkins Act.

As was stated by the chairman, "We conceive it to be the desire of Congress to absolutely prevent, it possible, the granting of discriminations in the way of railroad rates to favored shippers. This is by many claimed to be the greatest abuse of the day * * *. Your Committeee believes that the legislation proposed by the Elkins Bill together with the present

Interstate Commerce Law, covers about all the ways that thought or language can devise or describe to prevent the granting of discriminations in favor of one shipper as against another, or the building up of one concern through the favoritism of railroad corporations."

Because it was said by Chief Justice White in *Standard Oil Co. v. United States,* 221 U. S. 1:

> Although debates may not be used as a means for interpreting a statute, that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted,

And because these debates have so frequently been utilized by this court in its opinions, we digest here the substance of what was said in the House of Representatives concerning the purpose of the Act as shown by Volume 36, page 2141, f. f. of the Congressional Record:

> Mr. Dalzell: "In as much as this is merely one phase of the anti-trust regulations that have been so thoroughly debated, it is not thought advisable that there should be any protracted debate."
>
> Mr. Underwood: "I am in favor of the Elkins Bill. That Bill provides for the punishment of railroad or other transportation companies that give rebates to certain corporations. I believe that the granting of such rebates by our great transportation companies is one means of fostering the trusts, and therefore I favor the Elkins Bill, as far as it goes, but it does not go far enough."

Mr. Cannon: "In my own judgment, if regulation can be enacted and enforced that will dissolve a *real or alleged co-partnership between the great shippers and the common carriers,* so that each citizen engaged in interstate commerce can get the same rates that a man does who is a larger shipper, I believe that would be the great thing to do." (Applause on the Republican side).

Mr. Overstreet: (Stating that three things —in anti-trust legislation were sought to be accomplished) "The third proposition was the effort against discriminatory practices in rebates existing between great shippers and carriers."

Mr. Dalzell: "As the gentleman from Indiana has well said, we have already enacted into law two-thirds of the anticipated trust legislation (and we should) complete the legislation proposed for the control of trusts."

Mr. Hepburn: (Page 2158) "What they (referring to the Interstate Commerce Commission and others favoring this legislation) have objected to is the discrimination as to commodity, discrimination as to place, discrimination as to persons—mainly as to persons—in the rebates that are paid. Under the present law the man who pays the rebates—in the corporation, the individual who pays—is the one who is criminally responsible. The man who solicits, who persuades, who tempts this traffic, that man is not held responsible; but the only one held responsible is he who could or would testify. Now under this law it is made criminal to solicit or to receive equally with the offer of the gift. This is wise and in my humble judgment it will stop discriminations; and if we stop discriminations, then clearly the major portion of the evils complained of cease to exist."

Manifestly collusion with the carrier to build up one's business at the expense of competitors is a different thing entirely from an act in which the carrier is not sought to be involved in any arrangement.

(c) Usage in judicial expression and carrier parlance confirms the interpretation.

As we read the extensive citation of cases in the government's brief, they but illustrate those definitions and purposes which we urge. We cannot claim decisive significance here for those which (not involving analogous facts and being limited to instance of carrier misconduct) stress those very interpretations which we here insist shall not be abandoned.

In *New York, New Haven & Hartford v. Commission,* 200 U. S. 361, an injunction was sought to prevent the carrier from rate cutting by the device of itself dealing in and transporting commodities, with the result that proceeds would not equal cost and published freight rates. The decision expresses, consistently with our own views and those of the learned District Judge herein, that the purpose of the Elkins Act and the Act to Regulate Commerce "was to make the prohibition applicable to every method of dealing *by a carrier* by which the forbidden result (rate-cutting) could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was the purpose? It was to compel the carrier as a public agent to give equal treatment to all."

Armour Packing Company v. United States, 209 U. S. 56, represents an application of the Elkins Act to the situation for which it was enacted and for which

we here argue. The language quoted in the government's brief is more applicable in ours. The carriers had given a rate concession to the packers, and from the facts it was knowingly received. But the shipper claimed an honest belief that the Elkins Act did not apply. The exposition of the scope of the law in the *Armour* case, from which the Government's contention gains no support and our own receives a degree of confirmation, of course, did not exhaust definition. *Lehigh Coal & Navigation Company v. United States,* 250 U. S. 556.

United States v. Union Stockyard, 226 U. S. 286, represents a proper application of the statute and serves to define its scope as we contend. The shipper received a bonus from the carrier for erecting a plant on the carrier's lines. This is a *rebate* on anticipated shipping. The court correctly defines the scope of the statute as being to prevent favoritism.

United States v. Vacuum Oil Co. 153 Fed. 598, represents a proper application of the law to a concession from the published tariffs which in fact was not discriminatory. It is this case which uses the language "catch-all" so much relied upon. We think it obvious that a "catch-all" for *rate concessions* is not a "catch-all" for acts of a different and distinct nature not included within the just meaning of "concession."

Vandalia Railway v. United States, 226 Fed. 713, thus indicated the scope of the Elkins Act:

> Per Mack, Circuit Judge:
>
> The history of this legislation demonstrates that both discriminations and rebates have ever been sought to be hidden under the most

> subtle disguises. Every device that seeks to cover up either a rebate or a discrimination in interstate transportation is denounced by the statute—"

Citations of this character can be multiplied, but these concededly correct applications and definitions of the law, though indeed sounding favorable to our argument, were not made in view of facts as here presented.

But it is significant that since its enactment in 1903, save for the single example of *Metropolitan Lumber Co. v. United States*, the act found application only to prevent and to penalize favoritism of carriers and acts af shippers inducing these practices.

The best and most careful exposition of the meaning of the word "concession" which we have been able to find is contained in the opinion of the Circuit Court of Appeals, 7th Circuit, in the case of *Standard Oil Co. of Indiana v. United States, 164 Fed. 376,* and we refer particularly to Circuit Judge Baker's concurring opinion, page 390, in which it is reasoned as follows:

> The purpose of all canons of interpretation is to discover and effectuate the will of the lawmakers; and the primary rule, to which all others are subsidiary, is to read the text according to the ordinary rules of grammar and composition, and to take the words in their usual meanings. For the carrier, "to offer" or the shipper "to solicit" involves the knowing and consenting mind. No common, no lexical, no technical definition to the contrary can be found. To say "to offer knowingly," "to solicit knowingly," is the veriest tautology. Likewise "to grant" or "to accept" requires the conscious and understanding act of the intellect and will. If one does not know what he

is about, his alleged grant is no grant. If one does not know the scope and nature of his act, his alleged acceptance is no acceptance. Does any ambiguity arise because the words "to give" and "to receive" are also used? "To offer" and "to solicit" characterize the inchoate act. The completed act that is condemned is for the carrier "to grant or give" and the shipper "to accept or receive." Ordinary and accepted meanings of "give" and "receive" are synonymous with those of "grant" and "accept." As all those words appear in the same phrase of the same sentence, the principle of *ejusdem generis* forbids their being taken to indicate acts of antagonistic quality. Further the emphasis herein given to the verbs is doubled when regard is extended to the nouns, "rebate, concession, or discrimination." Each of these nouns in and of itself implies a comparison with, a measurement by, and a departure from, a determined standard. Congress did not say (but, if it had, an argument might well be made that negligence in not learning published rates was to constitute a crime):

"The shipper whose property shall be transported in interstate or foreign commerce at a less rate than that named in the published and filed tariffs shall be subject to a fine."

But Congress only said:

"The shipper who shall solicit, accept or receive a rebate, concession or discrimination in respect of the transportation of his property in interstate or foreign commerce shall be subject to a fine."

But even if by lexicon and grammar "to receive a concession" could fairly be given the meaning "to come into the possession of a concession without knowledge or consent," an auxiliary canon of construction would pre-

> vent that choice of meanings. That canon is that unless no other way is open a penal act will not be sustained and administered on the theory that it was "cunningly and darkly penned," so as to entrap a merely negligent citizen within the meshes of a criminal prosecution. To couple in the same breath and under the same punishment such vitally different acts as the wilful violation of the legally established equality between shippers and the unintentional failure to ascertain a published rate would constitute a trap unparalleled, so far as I have learned, in the annals of legislation."

While this case was pending the applicable portion of the Elkins Act was amended and the word "knowingly" was inserted. The receipt of a concession involved a conscious act according to the decision; and hence the word "knowingly" did not in any degree change the law.

In that case "concession" is defined as follows:

> The "concession" differs from the "rebate" only in this, that in the "concession" the shipper, instead of paying the full rate and receiving back part, merely settles for the difference. The result is the same—the property is transported for the same net amount less than the lawful rate.

In so far as "concession" may be applied to anything other than was therein defined, it has exactly the same scope and meaning as "discrimination." It is therefore essential that the carrier practice discrimination; and to gloss over the situation presented by the indictment characterizing it as the "receiving of a concession or discrimination whereby an

advantage is given or discrimination is practiced," is to do violence to the plain meaning of language and to fail to call things by their proper names. As the learned District Judge said:

> To say, under these alleged circumstances, that the carriers thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion, to do violence to the plain meaning of language and to fail to call things by their proper names.

That necessary element of consciousness on the part of the carrier to deserve the characterization of "concession" was lacking in the indictment in *United States v. Lehigh Valley Railway Co.* 254 Fed. 332. There it was held by Circuit Judge Mayer that the unlawful failure of the carrier to collect demurrer charges did not make out a case of concession or discrimination, and that the unlawful failure of shippers to pay demurrage charges did not make out a case of receiving a concession or discrimination. What was missing in the indictment was sufficient allegation of intent to supply the necessary mental elements attending the use of the words "concession" or "discrimination." If the carrier were charged with the failure to collect demurrage charges with the intent that the shipper should not at any time be called upon to pay these charges, the carrier would at least stand charged with having offered a concession. And if the shipper were charged with having knowledge of the carrier's intentions that it should not pay, and with the failure to pay by reason of an intent to ac-

cept the concession so offered, the shipper would stand properly charged with receiving a concession. To offer a concession does not imply a prior agreement between shipper and carrier, but it is an overture toward such an agreement. To receive the concession is nothing other than to accept the benefits of the offer.

In *North Central Railway Company v. United States,* 241 Fed. 25, the defendant, was charged with granting a concession by failing to collect certain royalties due it. It was deemed essential that such failure to constitute a concession must have been undertaken by the carrier for that purpose.

"Whether it was such a device, and whether the purpose was to give a concession or discrimination which resulted in shipping the coal to its destination at a less rate than that mentioned in the tariff was for the jury to determine. * * * If the arrangement made with the Mining Company constituted a device for effecting a reduction in rates, or for giving an advantage to the shipper, and was so intended, the defendant was guilty of a violation of the statute."

(d) The Government seeks a strained and novel interpretation which, if intended by the act, would have been expressed in clear language.

The legislative authority at the time of the enactment of the Elkins Act and subsequently thereto had before it acts of the class in the case at bar and had in clear language interdicted that type of action where it was adopted to obtain a lower rate. Section 10 of the Act to Regulate Commerce as amended by the Act of March 2, 1889 and June 18, 1910. (Acts Feb.

4, 1887, c. 104, § 10, 24 Stat. 382; March 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549).

As if to distinguish the possibilities and varieties of conduct here indicted from those covered by the Elkins Act and involving grants of the carrier, it was therein provided that "any person * * * who shall * * * by false billing, false classification * * * or by any other device or means whether with or without the consent or connivance of the carrier * * * obtain transportation for such property at less than the regular rates then established * * * shall be guilty of fraud" etc.

Here a fraud is called a fraud—not a concession or discrimination. The indictment at bar is for fraud. It was easy to define this offense of obtaining a rate advantage by fraud upon the carrier. The very distinction between this statute and the Elkins Act is that the primary aim here is, as respects shippers, to define *advantages fraudulently obtained without the connivance of the carrier, without concession granted or discrimination practiced. Nichols & Cox Lumber Co. v. United States,* 212 Fed. 588.

To prohibit the acts charged in the indictment at bar, the statute should use clear language. That such a purpose can be easily and clearly expressed is evidenced in Section 10.

(e) The learned District Judge correctly refused to follow United States v. Metropolitan Lumber Co.

The first occasion to ask any court for the construction of the Elkins Act contended for by the Government is exemplified in *United States v. Metro-*

politan Lumber Co., 254 Fed. 335. The shipper, by means of a fraud practiced on the carrier had violated the Service Order. As stated in *Avent v. United States*, 266 U. S. 127, Congress may make violations of the Commission's rules a crime. Because such legislation was not applicable to the shipper in that case, resort was had to the Elkins Act for the purpose of obtaining a conviction for nothing other than the violation of the Service Order, certainly not contemplated by the Elkins Act.

District Judge Haight's reasoning depends entirely upon the fact that he discovers no other statute which will fit the case, and that the Elkins Act is a "catch-all." Because Section 10 is inadequate, he argues that the Elkins Act is applicable.

The reference to the Elkins Act contained in *Missouri, Kansas & Texas Railway v. Harriman*, 227 U. S. 657, 671 was not made in view of any relevant contention. There this court held valid a contract with the carrier limiting liability to the valuation declared by the shipper. The quotation (page 32, Government's brief) stops short of the last sentence of the paragraph.

> We see no ground upon which this contract can be held upon its face to have offended against the statute.

We think that Justice Lurton's language was addressed to the validity of the contract limiting liability, and he concludes that the contract involved no unlawful act of the carrier. Clearly the decision does not depend upon whether or not the shipper violated the Elkins Act. Under the law then existing he could not recover more than the declared valuation. The use of this language was probably suggested by *Chi-*

cago & Alton Railway v. Kirby, 225 U. S. 155, a case in which the carrier did in fact contract to practice discrimination and to render a special expeditious service.

The plaintiff was denied recovery for the failure of the carrier to keep this illegal agreement. We observe that undervaluation did not then necessarily seek an advantage, since it limited liability. Where as under the Cummins Amendment (March 4, 1915, c. 176, 38 Stat. 1196, 1197) undervaluation is not effective as a limitation of liability, fraudulent undervaluation violates Section 10 of the Act to Regulate Commerce. But this is beside the point. The dictum of Justice Lurton did not deal with a material or even litigated point and was not intended as a deliberative statutory construction.

II.

NON-APPLICABILITY OF OTHER STATUTES IS NOT A LEGAL ARGUMENT

That other statutes do not apply cannot influence the construction of the Elkins Act. Nor do we consider that the obvious attempt to arouse moral opprobrium merits our attention. They are not legal arguments, and should be addressed to the legislative authority.

In this connection it is of some significance that Congress by the Emergency Coal Act (Sept. 22, 1922, 42 Stat. 1025), enlarged the powers of the Interstate Commerce Commission conferred by Sec. 402, Transportation Act of 1920 (41 Stat. 476), under which

authority Service Order 23 was promulgated. There a penalty was enacted against shippers who violate the Commission's rules. Such is the offense here charged, and such is the legislation necessary properly to define as an offense what is here charged. There can be no policy stronger than that which demands adherence to the meaning of language.

CONCLUSION

THE DECISION BELOW IS CORRECT

The learned District Judge carefully considered every element affecting the interpretation of the Elkins Act, and every argument advanced by the Government. We believe his decision and opinion correctly defines the scope of the Elkins Act. We submit that it should not be reversed.

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and
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Attorneys for Appellee.

APPENDIX A

HOUSE OF REPRESENTATIVES

57th Congress
2nd Session.

Report
No. 3765

Regulating Commerce with Foreign Nations, etc.

February 12, 1903.—Referred to the House Calendar and ordered to be printed.

Mr. Mann, from the Committee on Interstate and Foreign Commerce submitted the following:

REPORT

(To accompany S. 7053)

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 7053) to further regulate commerce with foreign nations and among the states, having had the same under consideration, beg leave to report as follows:

The purpose of this bill is to increase the efficiency of the present interstate-commerce law. There are four principal propositions included in the bill.

First. The present law provides that any director or officer of a corporation, common carrier, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who violates the provisions of the interstate-commerce act shall be guilty of a misdemeanor and punished by a fine not

exceeding the sum of $5,000 and by imprisonment for a term of not exceeding two years, or by both fine and imprisonment.

No penalty is aimed directly at the corporation itself by the existing law. The bill which we recommend does away with the penalty of imprisonment and provides that the violation of the law by any officer, agent, or other person acting for the corporation shall be deemed a violation by the corporation itself, and shall subject the corporation offending to a fine of not less than $1,000 nor more than $20,000 for each offense.

In extensive hearings before your committtee upon the general subject of proposed amendments to the interstate-commerce law it was strongly urged by the members of the Interstate Commerce Commission that the provisions of existing law providing for punishment of the officers and agents of railroads, but not for the punishment of the railroad itself, prevented the enforcement of the law forbidding rebates and discriminations.

The experience of the Interstate Commerce Commission has been that it is impossible to obtain proof of the granting of a rebate by the officer of a railroad to some favored shipper unless the officer himself gives the evidence, in which case he is free from prosecution. It is not proposed in the pending bill to do away with the penalty of fine against the officer of the railroad who violates the law, but to extend the penalty to the corporation itself. With this bill enacted into law, if a rebate is illegally granted by the officer of a railroad, he may be called upon to testify, and if he tells the truth he will be absolved from prosecution, but his railroad will be subject to

a penalty of $20,000 for each offense. We call attention to some of the statements made before our committee by members of the Interstate Commerce Commission.

Hon. Martin A. Knapp, chairman of the Interstate Commerce Commission, in his testimony before us stated:

> Two difficulties at once arise, and those difficulties I beg to submit to you are of very different character and require very different treatment. The first difficulty is how are you going to compel the observance of these tariffs when they are once published; that is, *how are you going to stop rebating and rate cutting and all those different devices by which one shipper in a given locality gets better rates than his business rivals? The way the present law undertakes to prevent that kind of evil is to say that rebates and rate cutting and all secret arrangements which are preferential in their character are misdemeanors and are to be punished as such, and I do not know any other way to treat that class of difficulties.* Of course, I think there is perhaps something to be said in favor of supplementing that treatment with one which should subject the carriers engaging in such practices to a forfeiture to be recovered in a civil action; but aside from those two remedies I know of no other which can be applied to this class of misdemeanors or offenses.
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> Now, there are two respects in which the present law, in its attempt to reach and prevent and punish those who permit these practices, has proven to be entirely inadequate. The first of these is that the corporation carrier is not liable, but only the officer, the agent, or representative. That is to say, the real offender, the corporation, which is the bene-

ficiary of the illegal arrangement, is not under any liability. Now, that has two very unfortunate results. One is that you can not obtain voluntary testimony under such circumstances. Offenses of this kind are not like those against rights of property, which are sought to be prevented by general laws, because in those cases there is always somebody who is injured, there is somebody who is in the attitude of prosecutor, there is somebody who is not only willing but desires to bring the offending party to justice. *But when a railroad officer makes a secret compact with a shipper which gives him a lower rate than the public are required to pay, both parties are presumably benefited by the transaction;* neither wants to expose it and ordinarily neither of them will disclose it; certainly not by any voluntary action. Railroad officials of that grade which participates actually in transactions of this kind are a sort of fraternity; they are like lawyers and are personally intimate with each other, and over and over again they tell us that they will not under any circumstances give evidence or be in any way connected with the effort to disclose the truth of those transactions when the result of that disclosure might be to inflict punishment and suffering upon some friend or send some associate to jail.

Now, directly connected with that is the further fact that the shipper is not directly benefited by this rate at all, unless the secret rate gives him an actual discrimination against some other shipper, but that is something that very rarely happens, because these rebates and secret arrangements are not ordinarily made with the isolated individual shipper, but they are made with great combinations of shippers; they are made ordinarily under circumstances such that the transaction covers practically all

the traffic that moves from a given point. Consequently there is no actual discrimination between the shippers.

Now, let me speak further of the difficulties —let me go one step further—the difficulties growing out of the fact that the corporation is not itself liable. In the first place, the Commission conceivably can take up an instance and keep calling witnesses and forcing them to testify until they have narrowed the question down to just some few, or perhaps one, of the officials of the company. Then what have you found? Some subordinates, some assistant traffic manager, most likely some clerk, who actually did the thing.

Who wants to indict him, a subordinate, a clerk carrying out the implied if not the expressed orders of his superiors, a man whose position depended on his doing what he did? Nobody wants to send such a man as that to jail or to mulct him with a fine that he could not possibly pay, and it is anomalous and it does not satisfy one's sense of justice to say that the corporation, the real beneficiary of the transaction, should go scot free, and that the only person who can be reached is some subordinate agent who is merely in charge of this operation.

Another thing right in that connection. Under the Constitution every man who is examined before the Commission or before any court and compelled to testify thereby secures perfect immunity for himself. He can not be prosecuted for that; so that the further the Commission goes in ferreting out the details the further it goes in letting loose the very men who are guilty. Every man we call is granted absolute immunity.

Now, what happens?

This illustrates another phase of this same question; men high up in railroad circles, men

known to you all by name, and many of them personally, came before us in Chicago and admitted exactly what they did, and said that they were personally responsible for it. They were perfectly safe in doing that. Every one of them thereby secured absolute immunity. But when you asked one of those men what particular shipper he paid money to, and on what day, he would refuse to tell. He will say that he does not know, and generally he does not know. *What happens, apparently, is this: The president or some executive officer in charge of traffic makes the bargain; he does not attend to the details; he does not know about a particular shipment or a particular payment;* and also whatever record there may be made at any time in connection with the transaction, so that the understanding may be known to the parties, is immediately destroyed. In every instance they testified that no records remained, that their books would show nothing, and they themselves, although they admitted the responsibility for what was done, had no knowledge of any particular transaction.

It is idle to suppose that you can apply criminal remedies in the state of the criminal law for the correction of such abuses. It does not happen; it will not happen. But I believe that if the corporation could be indicted, if the officials, the subordinate officials, the competitors, or their representatives, or anybody having knowledge of the transaction could be examined before the Commission and compelled to disclose the facts on which the corporation was liable, then the corporation could be indicted and mulcted with a fine. Until that can be done, and corporation carriers be subjected to large pecuniary losses as a result of these offenses, not much will happen to correct them in the way of criminal remedies.

Mr. Stewart: Do you not think that imprisonment in addition to a fine would have a good effect?

Mr. Knapp: No, Mr. Stewart, I do not. While I regard these offenses as involving, in many cases, a very high degree of moral turpitude, and I think there are more serious wrongs against order and the inalienable rights of the citizen than burglary or larceny, still we have to take the facts as they are and public sentiment as it exists, and in view of that it is my judgment that punishment by imprisonment instead of being an aid is a hindrance. It is a thing which operates against getting information necessary to convict.

Mr. Stewart: Do you think a fine, however large, would deter these large corporations?

Mr. Knapp: Yes; and then there is another reason. You can not do anything to a corporation except fine it, and it does not quite satisfy the sense of justice to say that the real offender shall only be fined, while some paid subordinate in lesser degree may possibly go to jail. Now, I believe that if we could get this law in shape where it would be practically feasible, and in many cases comparatively easy to prove the offense against the corporation, and that corporation could be held to pay a large fine, it would not be simply the pecuniary loss, but the publicity—the fact that the railroad has been indicted and compelled to pay a large fine—would operate as a powerful deterrent, and I do not think we shall get along very far in preventing rate cutting by criminal methods until you gentlemen change the law in that regard.

* * * * *

Mr. Corliss: What information have you upon the subject with reference to the railroad corporations themselves—the officers of the

railroads—as to their position upon that question?

Mr. Knapp: All that I know about that, Mr. Corliss, is what they tell us. Over and over again railroad officials have said to me, "You can not expect—it is against human nature; appeal to your own experience, your own feelings—you can not expect that I will give testimony that may possibly result in the fining of my associate and friend over here who occupies a similar relation to another railroad to that which I occupy to mine. I am not going to become an informer against him.

But they all say that if the result of the disclosure and prosecution would be a fine against the other man's corporation they would not hesitate to furnish the proof and would actively engage in the prosecution.

This is the statement made to us. You can judge of the truth of it and the probabilities as well as I can.

And these two amendments, the one which would make the corporation themselves liable, and the one which would make the shipper liable, without the necessity of proving absolute discrimination—these two amendments ought to be made at once, at this session, if no others are made.

* * * * *

I would do just as they do on the other side. I would make the corporation liable, and also its officers and agents, and also the shipper liable, and also his officers and agents. But I think there is much in keeping them both in from this point of view. Now, see what the actual situation is. Remedies of this kind must be applied by the Federal courts and the Federal district attorneys. All that the Commission can ever do is to furnish information on which they shall proceed. Now, each situation therefore ought to be inquired of and dealt

with in reference to its peculiar circumstances, *and when a case of extensive rebates or cut rates is brought to the attention of the Federal authorities, it might be a case where, in their judgment, the more guilty party was the shipper and the one more easily convicted the carrier, or it might happen that the more guilty was the carrier and the one more easily convicted was the shipper, and it seems to me that those who are charged with the responsibility of enforcing the law ought to have the opportunity, as they practically would under this proposed law, of deciding against which one of the parties they would proceed.*

* * * * *

I want to repeat that there are two changes in the law relating to the enforcement of criminal remedies which are important, against which there is no reasonable objection, against which I venture to say no one will come here and interpose opposition. They are that the corporation carrier shall be made liable, and not simply its agent and representative, and that the shipper shall be made liable who knowingly accepts a lower rate than that provided by the published tariff without being obliged to show that he thereby secured a discrimination in favor of himself and against his business rivals.

Those two changes in the tenth section would greatly aid, in my judgment, the practical administration of the criminal machinery devised for preventing rebates and compelling carriers to observe their published schedules.

Hon. Joseph W. Fifer, a member of the Interstate Commerce Commission, in his testimony before the committee said:

Now, how are you going to prevent, how are you going to stop, these violations of the act

which are made criminal? You have been told by my colleagues that there is no penalty denounced against the carrier by the law, and that is true. *Gentlemen, these violations are* what the law calls *malum prohibita,* and I care not what certain individuals may think of it, mankind generally hold that the same moral turpitude does not attach to an act of that kind as does to a crime, which is *malum in se,* such as burglary and larceny, crimes in the absence of all law.

And you can see, bearing that in mind, what a great difficulty confronts the Commission when it undertakes to enforce the criminal features of the act. Many statutory prohibitions, acts that are made misdemeanors by a statute, a short time ago were no offenses at all. Yesterday the act violated no law; today it is made a penal offense, and the offender is subject to a heavy fine and a term in the penitentiary.

These men have friends, they have standing in the community. The whole community may know that they have at different times violated the law, but they have just as many friends as they had before. They are not ostracized in society; and you undertake to convict one of them, and you meet great difficulties. Now, what should be done? Judge Knapp has told you, and in that I agree with him, that the corporation itself should be made subject to indictment, and upon conviction it should be punished; of course, it cannot be imprisoned it loses no caste in society, and every person who is cognizant of the facts can be compelled to testify and there is no immunity; and you know, as practical men, under those circumstances you can get testimony and you can get conviction, and if the penalty is large enough, fixed by the law, it will be just as much of a deterrent as the other, and the testimony will be easily acquired.

I have been on the Commission for a little over two years; I have heard many railroad men testify, and I do not recollect that in any instance we ever secured testimony that would justify an indictment until the hearing in Chicago last January. We have probed that question, at least in some cases. In this very case we went, in the first instance to Kansas City. We got nothing. We followed it up and went to Chicago, and a clean breast was made of the whole thing. They testified that there was a secret cut, and I think some of them, at least, testified that only one man would know of it. In most instances papers were destroyed bearing the evidences of the violation; no books were kept. How are you going to dig out and get hold of any particular individual? And when you get him you put him on the stand and he has immunity from punishment. How are you going to deal with that.

There is another provision of the criminal law that I think ought to be amended, and that it is to make the departure from a published rate punishable and treated as an unjust discrimination. My friend, Mr. Mann, asked a very pertinent question yesterday in regard to these packing-house rates from the Missouri River to Chicago. There are only a few great packing-houses, and I believe—and I think that is the opinion of all my colleagues—that there was no unjust discrimination in that instance. Although a departure from a published rate, and although in a sense a secret rate, all the persons or corporations who could avail themselves of that cut rate knew of it in some way. The rate on packing-house products from the Missouri River points, the published rate, was 23½ cents. They were actually carrying the goods for 18½ cents, 5 cents less.

Second. *The existing law prohibits rebates and discriminations, but does not prevent the cutting of published rates unless discrimination is shown.* In most cases it is practically impossible to show the discrimination. In the investigations made by the Interstate Commerce Commission respecting rates on dressed beef and packing-house products from Kansas City and Chicago *it was finally discovered that for years the railroads had constantly and habitually disregarded their published tariffs* and had carried such products at rates below the published rate and the actual rate amounted to millions of dollars a year; and it was the unanimous testimony that all the shippers who were interested in those rates got practically the same rate. There was, therefore, no discrimination between the shippers, and no shipper was liable to prosecution for obtaining a rate which discriminated in his favor. But the effect of such secret cutting of rates is to place in the business, because *no person can afford to enter into competition who does not receive the cut of rates, and no person is in a position to demand or receive such cut until after he shall have become established in business and have an extensive business behind him.*

The bill which we recommend provides a penalty, by fine of not less than $1,000 nor more than $20,000, against any person or corporation which shall give or receive any rebate, concession, or discrimination in respect of the transportation of property whereby such property shall be transported at a less rate than that named in the tariffs published and filed in accordance with the interstate-commence law. *This provision makes it a penalty against the railroad company to give to anyone a rate less than the published rate*

while that rate remains in force, and it also makes it a penalty against any person receiving the benefit of a rate less than the published rates.

Chairman Knapp stated to your committee that he favored making it a penal offense to make any departure from the published rates whether there be a discrimination or not. Mr. Knapp said:

> I want two things; I want the corporation carrier made liable, and I want the shipper made liable when he accepts a preference or secret rate whether there is discrimination or not.

Third. Section 2 of the bill makes it lawful to include as parties to any proceeding for the enforcement of the Interstate Commerce Act, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and authorizes final judgment against such additional party. This is a much-needed amendment to the act, for the purpose of enabling all parties in interest to be brought before the court in the same suit.

Fourth. The first and second propositions above referred to practically exhaust the power of legislation to prevent rebates and discriminations through criminal prosecutions. *We conceive it to be the desire of Congress to absolutely prevent, if possible, the granting of discriminations in the way of railroad rates to favored shippers. This is by many claimed to be the greatest abuse of the day.* But we all know that the officers of the railroads who grant rebates and the officers of the private corporations who solicit and accept them are men of high standing in their respective communities, and that it is a very difficult matter to obtain evidence sufficient to indict them, and

still more difficult to obtain judges and juries who will convict them.

It is proposed, therefore, to provide a civil remedy as well as a criminal remedy against rebates and discriminations.

The bill proposes to confer jurisdiction upon the equity courts of the United States to summarily hear petitions filed by the Interstate Commerce Commission, and upon such hearing to issue writs of injunction and other process prohibiting and forbidding the granting of rebates or the cutting of rates, enforcing observance of the published tariffs and requiring discontinuance of discrimination. In a case commenced by the Interstate Commerce Commission against various railroads before Judge Grosscup, in Chicago, that judge said in March last:

> The question presented by this application is a new one and a very great one, and I will not pass upon it finally until there have been elaborate arguments on each side. If the United States courts, sitting in equity, have the power called for, it will make them master of the whole rate situation, for an inquiry instituted by them to inquire whether the injunction has been violated or not will, much more readily than criminal proceedings, probe to the bottom of the railroad's doings. For my own part, I believe that railroad rates ought to be as stable as postage rates, so that every shipper would know, as certainly as the sender of a letter, how much it would cost him and the fact that no one else could send it for less. An injunction something like this has been granted in other cases, notably in the Debs case, but an important distinction between that case and this is that in the Debs case, the things complained of were in their nature temporary,

while in this case the injunction will be against conduct running continuously into the future. The interstate-commerce act has hitherto been ineffectively executed, but the taking of such power by the courts, as this injunction implies, might turn out to be the vitalizing of the act.

Your committee believes that the legislation proposed by the Elkins bill, together with the present interstate commerce law, covers about all the ways that thought or language can devise, or describe to prevent the granting of discriminations in favor of one shipper as against another, or the building up of one concern through the favoritism of railroad corporations.

Your committee recommends the following amendments to the bill S. 7503.

In line 9, page 1, after the word "shall" insert the word "also."

In line 23, page 4, strike out the words "it shall be authorized to present," and insert after the word "petition" in the same line the words "may be presented."

In line 18, page 5, after the word "States," insert "whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission."

In line 11, page 6, strike out the words "or corporation."

In line 13, page 6, strike out the words "or it."

Insert at the end of section 3 the following:

"PROVIDED, That the provisions of an act entitled 'An act to expedite the hearing and

> determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." "An act to regulate commerce," approved February 4, 1887, or any other acts, having a like purpose that may be hereafter enacted,' approved February 12, 1903, shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission."

The last amendment is for the purpose of giving to suits commenced in the name of the Interstate Commerce Commission the benefit of early hearing and disposition in the same manner as is provided for suits commenced in the name of the United States by the recent act.

The other amendments are for the purpose of making the act more complete and effective.

As amended your committee recommends the passage of the bill S. 7053.

APPENDIX B

Par. 15, 16, 17, Sec. 1. Act to Regulate Commerce as Amended. Sec. 402 Transportation Act 1920.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after sub-

sequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

(17) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions

of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States; *Provided, however,* that nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act.

APPENDIX C

EMERGENCY COAL ACT

(Sept. 22, 1922, 42 Stat. 1025)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that by reason of the prolonged interruption in the operation of a substantial part of the coal-mining industry in the United States and of the impairment in the service of certain carriers engaged in commerce between the States and by reason of the disturbance in economic and industrial conditions caused by the World War a national emergency exists which endangers the public health and general welfare of the people of the United States, injures industry and business generally throughout the United States, furnishes an opportunity for the disposition of coal and other fuel at unreasonably high prices, limits the supply of heat, light, and power, threatens to obstruct and hamper the operation of the Government of the United States and of its several departments, the transportation of the mails, the operation and efficiency of the Army and the Navy, and the operation of carriers engaged in commerce among the several States and with foreign countries.

Sec. 2. That the *powers of the Interstate Commerce Commission under the Act entitled "An Act to regulate commerce," approved February 4, 1887, as amended, including the Transportation Act, 1920, and especially under section 402 of said Transportation Act, 1920, are, during the aforesaid emergency, enlarged to include the authority to issue in transporta-*

tion of coal or other fuel orders for priorities in car service, embargoes, and other suitable measures in favor of or against any carrier, including vessels suitable for transportation of coal on the inland waters of the United States which for such purpose shall be subject to the Interstate Commerce Act, or region, municipality, community, or person, copartnership, or corporation, and to take any other necessary and appropriate steps for the priority in transportation and for the equitable distribution of coal or other fuel so as best to meet the emergency and to promote the general welfare, and to prevent upon the part of any person, partnership, association, or corporation the purchase or sale of coal or other fuel at prices unjustly or unreasonably high. This Act shall not be construed as repealing any of the powers heretofore granted by law to the Interstate Commerce Commission but shall be construed as conferring supplementary and additional powers to said commission and as an amendment to section 1 of the Interstate Commerce Act, and subject to the limitations and definitions of commerce controlled by said Act, and all powers given said Interstate Commerce Commission shall be applicable in the execution of this Act.

Sec. 3. Because of such emergency and to assure an adequate supply and an equitable distribution of coal and other fuel, and to facilitate the movement thereof between the several states and with foreign countries, to supply the Army and Navy, the Government of the United States and its several departments, and carriers engaged in interstate commerce with the same during such emergency, and for other purposes, and for the further purpose of assisting in carrying into effect the orders of the Interstate Commerce Commission made under existing law or under

section 2 hereof, there is hereby created and established an agency of the United States to be known as Federal Fuel Distributor, whose appointment shall be made and compensation fixed by the President of the United States. Said distributor shall perform his duties under the direction of the President.

Sec. 4. It shall be the duty of the Federal Fuel Distributor to ascertain—

(a) Whether there exists within the United States or any part thereof a shortage of coal or other fuel and the extent of such shortage;

(b) The fields of production of coal and other fuel and the principal markets to which such production is or may be transported and distributed and the means and methods of distribution;

(c) The prices normally and usually charged for such coal and other fuel and whether current prices, considering the costs of production and distribution, are just and reasonable; and

(d) The nature and location of the consumers; *what persons, copartnerships, corporations, regions, municipalities, or communities should,* under the acts to regulate commerce administered by the Interstate Commerce Commission, including the Transportation Act, 1920, *in time of shortage of coal and other fuel, or the transportation thereof, receive priority in transportation and distribution,* and the degree thereof, and any other facts relating to the production, transportation, and distribution of coal and other fuel; and when so ascertained the Federal Fuel Distributor shall make appropriate recommendations pertaining thereto to the Interstate Commerce Commission from time to time either on his own motion or

upon the request of the commission, *to the end that an equitable distribution of coal and other fuel may be secured so as best to meet the emergency and promote the general welfare.* All facts and data within the possession of the Federal Fuel Distributor shall be at all times accessible and furnished to the Interstate Commerce Commission upon its request. The Interstate Commerce Commission is hereby authorized and directed to receive and consider the recommendation of the Federal Fuel Distributor, based upon his reports upon the foregoing subjects, and any other information which it may secure in any manner authorized by law.

Sec. 5. The Federal Fuel Distributor may make such rules, regulations, and orders as he may deem necessary to carry out the duties imposed upon him by this Act and may co-operate with any department or agency of the Government, any State, Territory, district, or possession, or department, agency, or political subdivision thereof, or any person or persons, and may avail himself of the advice and assistance of any department, commission, or board of the Government, and may appoint or create any agent or agency to facilitate the power and authority herein conferred upon him; and shall have the power to appoint, remove and fix the compensation of such assistants and employees, not in conflict with existing laws, and make such expenditures for rent, printing, telegrams, telephones, furniture, stationery, office equipment, travel, and other operating expenses as shall be necessary for the due and effective administration of this Act. All facts, data, and records relating to the production, supply, distribution, and transportation of coal and other fuel in the possession of any commission, board, agency, or department of the

Government shall at all times be available to the Federal Fuel Distributor and the Interstate Commerce Commission, and the person having custody of such facts, data, and records shall furnish the same promptly to the Federal Fuel Distributor or his duly authorized agent or to the commission on request therefor.

Sec. 6. *That whenever the President shall be of the opinion that the national emergency hereby declared has passed he shall by proclamation declare the same, and thereupon, except as to prosecutions for offenses, this Act shall no longer be in force or effect, and in no event shall it continue in force and effect for longer than twelve months from the passage thereof.*

Sec. 7. Every person or corporation who shall knowingly make any false representation to the Interstate Commerce Commission or the Federal Fuel Distributor, or to any person acting in their behalf or the behalf of either of them, respecting the price at which coal or other fuel has been, is being, or is to be sold or bought, the inquiry being made for the purposes of this Act, *or whoever having obtained coal or other fuel through a priority order or direction shall dispose of the same for purposes other than those for which said priority order or direction was issued without the consent of the Interstate Commerce Commission, shall be deemed guilty of a misdemeanor,* and upon conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person or any officer or director of any corporation subject to the provisions of this Act, or the Interstate Commerce Act and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or per-

son acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, in the discretion of the court. Every violation of this section may be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation is committed, or through which the transportation is conducted, or in which the car service is performed, or in which such concession or discrimination is granted, or given, or solicited, or accepted, or received; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Sec. 8. There is hereby authorized to be appropriated the sum of $250,000, available until expended, for the purposes of this Act, including payment of personal services in the District of Columbia and elsewhere, and all expenses incident to organizing the work of the President's fuel distribution committee, and not exceeding $50,000 thereof shall be available for reimbursement and payment upon specific approval of the President of expenses incurred since May 15, 1922, in connection with the work of the President's fuel distribution committee organized for the purpose of helping to meet the emergency existing in the matter of fuel.

Approved, September 22, 1922.

(Italics ours.)

APPENDIX D

SECTION 10—ACT TO REGULATE COMMERCE

(Acts Feb. 4, 1887, c. 104, § 10, 24 Stat. 382; March 2, 1889, c. 382, § 2, 25 Stat. 857; June 18, 1910, c. 309, § 10, 36 Stat. 549).

Sec. 10. [*As Amended March 2, 1889, June 18, 1910, and February 28, 1920.*] (3) Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent of connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for dam-

age or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: PROVIDED, That the penalty of imprisonment shall not apply to artificial persons.

CONTENTS

CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 217

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

MICHIGAN PORTLAND CEMENT COMPANY,
DEFENDANT IN ERROR

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE DEFENDANT IN ERROR

DEFENDANT'S DEMURRER

The Counsel for the Government do not refer to all the grounds of the defendant's demurrer. (Brief p. 13.)

In addition to the points referred to by the Government we also raised the point that Service Order No.

23, paragraph 7, did not call for the *transportation* of coal according to any prescribed "classes of purposes" and "order of classes" and that, while by paragraph 1 of the order, preference and priority in *transportation* were to be given, among other things, to coal as a commodity, the extent of paragraph 7 was to call for "classes" and "order" only as to *car service* (R. p. 40). The defendant in error was indicted for securing a concession in *transportation.*

ARGUMENT

SUMMARY

A. The Elkins Act has no application to the acts charged.

1. This Court in passing upon the Elkins Act will not adopt a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy.

2. The Elkins Act does not make criminal the violation of an order of the Commission, only the violation of a published tariff.

3. Except as the thing is only offered or solicited, the Elkins Act forbids only collusive dealings between carrier and shipper as to tariff rates, rules, practices and regulations.

(a) The word "device" in section 1 does not qualify the second "whereby" clause, but relates only to published rates.

(b) Under the express language of the Act where granting or giving, accepting or receiving is charged, there must be a co-transgressor.

4. The decisions of this court do not support the contention of the Government that the taking of an advantage by a shipper, there being no collusion on

the part of the carrier, is a crime punishable by the Elkins Act.

B. The commission's Service Order No. 23, paragraph 7 (Government's Brief, p. 47) prescribed "classes of purposes" and "order of classes" only with respect to *car service*, not *transportation*. Defendant in error was indicted for securing preferential treatment in *transportation*, when Service Order No. 23 did not deny it *transportation*. The Commission had no power to fix rules and regulations giving preferences and priorities in car service until the passage of the Emergency Fuel Act (Act of September 22, 1922, c. 413, 42 Stat. 1025).

A. THE ELKINS ACT HAS NO APPLICATION TO THE ACTS CHARGED.

1. THIS COURT IN PASSING UPON THE ELKINS ACT WILL NOT ADOPT A STRAINED AND ARTIFICIAL CONSTRUCTION, BASED CHIEFLY UPON A CONSIDERATION OF THE MISCHIEF WHICH THE LEGISLATURE SOUGHT TO REMEDY.

United States v. Harris, 177 U. S., 305, 309:

> "Was it the purpose of Congress when prescribing a penalty for any company, owner or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the Act?
>
> "It was the view of the courts below that receivers were plainly not within the letter of the statute, and not necessarily within its pur-

pose or spirit; and an attentive examination has brought us to the same conclusion.

"It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

The cases cited by the Government do not apply in support of its contention that a broad construction should be given to the Act, unhampered, it would seem, even by the express language of the enactment and the stated intention of the congressional committee having the legislation in charge.

Logan v. Davis, 233 U. S. 613, is a civil case. As authority for the interpretation which the court gives

the statute, reference is made to *United States v. Southern Pacific Railroad Company,* 184 U. S., 49, 56, also a civil case, which was decided upon equitable principles.

In *United States v. Lacher,* 134 U. S., 624, the court said:

> "We entertain no doubt that two classes of offences were intended to be created by section 5467, one relating to embezzlement of letters, etc., and the other to stealing the contents, and that this construction is not reached in violation of any rule of construction applicable to penal statutes."

Certainly the bare citation of that case does not prove that Congress intended "everything" by the Elkins Act.

United States v. Martin, 176 Fed. Rep., 110, 113, also states an accepted and well known rule, and one as readily citable by defendant in error. Penal statutes are to have no enlargement by implication, no extension to cases not fairly within their terms, but a sensible interpretation.

The "hobo" picking the pocket of the conductor of cash fares, is only one of many such illustrations that can be given. If a man, by force, seizes a railroad company's locomotive and hauls a car of freight from the company's yard to his factory, he, while guilty doubtless of a serious crime, is not violating the Elkins Act. Or if a man ships in interstate commerce intoxicating liquor to himself and then in a lonely place

holds up the train and retakes possession of his property, is he to be punished under the Act? We apprehend the Government would seek some other criminal statute, and even if hard put to find one, would not proceed under the statute under review.

The application of the rule of intention is all we contend for here, but there must not be a "strained and artificial construction" put upon words to find an alleged intention.

Louisville & Nashville R. R. Co. v. Mottley, 219 U. S., 467, 474:

> "That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. *Platt v. Union Pacific R. R. Co.,* 99 U. S. 48, 64. The court cannot mold a statute simply to meet its views of justice in a particular case."

The illustration (brief p. 34) put by the Government of a carrier favoring shipper A, where the shipper's conscious participation is hard to prove, counts for nothing in the decision of this case. This difficulty which the Government conjures up for itself is easily dissipated by a reading of paragraphs (6) and (12) of Section 1 of the Interstate Commerce Act (41 Stat. L. 475-76). Under (6) the carrier must observe and enforce just and reasonable regulations and practices. Under (12) failure or refusal of a carrier to make a just and reasonable distribution of cars for the trans-

portation of coal, is declared to be unlawful and a penalty is fixed. Furthermore, under (13) of Section 1, the Commission can require the carrier to file with it all rules and regulations relating to car service (and this we believe the carriers are in the practice of doing). Then under Section 1 of the Elkins Act (Ch. 708, 32 Stat. 847; Ch. 3591, 34 Stat. 587) we read: "The wilful failure upon the part of any carrier subject to said Acts * * * or strictly to observe such tariffs until changed according to law, shall be a misdemeanor" etc.

Counsel distinguish between discriminations, rebates and concessions, arguing, apparently, that a rebate or discrimination is something consciously yielded by the carrier, while it was a "concession" which defendant in error took or received (brief 24-25). If there is force in the distinction indulged in, and we do not say there is none, the excerpts quoted by counsel from the Committee report, would appear to refute the intention imputed to Congress.

That intention is plainly limited to "the granting of discriminations * * * or the building up of one concern through the favoritism of railroad corporations." That, then, was the full extent of the application of the Act as intended by the legislature.

2. THE ELKINS ACT DOES NOT MAKE CRIMINAL THE VIOLATION OF AN ORDER OF THE COMMISSION, ONLY THE VIOLATION OF A PUBLISHED TARIFF.

The Elkins Act is entitled "An Act to further regulate commerce with foreign nations and among the

States" (Ch. 708, 32 Stat. 847). In other words, it was intended by Congress to give greater effect to the Act to Regulate Commerce (Ch. 104, 24 Stat. 380) and other acts amendatory thereof. The language of each enactment is, in some respects, necessarily similar. *Nichols & Cox Lumber Co. v. United States,* 212 Fed. Rep. 558; 129 C. C. A. 124.

Section 6 of the Interstate Commerce Act (41 Stat. 483) requires the common carriers subject thereto to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares and charges, etc. Such schedules shall also state separately "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine * * * the value of the service rendered to the passenger, shipper or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

Section 1 of the Elkins Act provides a penalty for the wilful failure of any carrier to file and publish "the tariffs or rates and charges as required by said Acts," or for the failure of the carrier "strictly to observe such tariffs." Then, in the same sentence, as the next and concluding clause, the prohibition under which defendant in error has been called to account, is stated. What meaning and effect are to be given to the words and their context? The Act first states the penalty for the carrier's failure to fix the standard of the rates to be charged or the privileges or

facilities to be granted or allowed, and then proceeds to make it unlawful for any person or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, advantage or discrimination,—that is, *something other than that which has been made uniform and become standardized through the tariff publication.*

Davis v. Cornwell, 264 U. S. 560, 562:

> "*Chicago & Alton R. R. Co. v. Kirby,* 225 U. S., 155, settled that a special contract to transport a car by a particular train, or on a particular day, is illegal, when not provided for in a tariff. That the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. * * * The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery."

Hence, the court held that the special contract counted upon, to furnish cars on a day named, was void as not provided for in the published tariffs of the carrier.

It follows from the reasoning of the two foregoing cases that if offers to give expedited transportation or preferential placement of cars for loading must be published and filed, in order to be effective, so the

denial of any transportation service and the refusal to place cars upon reasonable demand, must also be published and filed.

Or, conversely, it can be said that the right of gas plants and other public utilities to have preferential loading and transportation of coal, should have been embodied in tariff publications. Then if defendant in error was given and received a service thus denied to it, because it was not a member of the preferred class, its culpability would be complete. Otherwise, what is there to measure discrimination, concession or advantage?

The orders of the Commission upon which the Government has predicated its indictment, are not tariffs fixing the standard or quantity of service to which defendant in error was entitled. We have heretofore adverted to the fact that under paragraph (13) of section 1 of the Interstate Commerce Act, the Commission might have required the carriers to publish and file the rules and regulations pertaining to car service prescribed by it, but it did not do so. We submit then, that its order cannot support what Congress intended should serve as the criterion.

Armour Packing Co. v. United States, 209 U. S. 56, 72:

> "* * * the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

But the *Armour case* must be understood in the light of *Lehigh Coal & Navigation Co. v. United States,* 250 U. S. 556, 563-564:

> "It is in effect the contention of the Government that the language of the case exhausts definition and excludes the supposition of the questions of the Circuit Court of Appeals. We are unable to concur. The language of the case is easily explained by the question that was presented for decision. The Armour Packing Company contended that the act was directed only at fraudulent conduct, the obtaining of a rebate by some dishonest or underhand method, concession or discrimination. The language of the court was addressed to this contention and its selection and adequacy are manifest.
>
> "No such contention is made in the case at bar and there are other distinguishing elements. It will be observed that by the statute and the decision the test of equality is the tariff rate. It was said in the opinion that it is 'the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates' *(New York Central R. R. Co. v. United States,* 212 U. S. 500, 505). And such was the offense of the Armour Packing Company. There was no evasion of the tariff rate in the case at bar."

New York, New Haven & Hartford v. Commission, 200 U. S. 361, 391:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst

> seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs and forbidding rebates, preferences, and all other forms of undue discrimination."

United States v. Union Stock Yards, 226 U. S. 286, 309:

> "If these companies had filed their *tariffs*, as we now hold they should have filed them, *they would have been subject to the restrictions of the Elkins Act as to departures from published rates* • • • and we must consider the case in that light • • • and *this preferential treatment*, as we have said, *would have been in violation of that act.*" (Italics ours).

If the dealings between the carrier and the shippers in the foregoing case were not cognizable under the Elkins Act, because the facilities and privileges were not published and filed, the necessity for publication and filing are present here, if the indictment is to stand.

Throughout the Interstate Commerce Act, wherever Congress saw fit to make the violation of a Commission order a crime, or to impose a penalty for such violation, it did so in express terms. Witness Sec. 1 17 (41 Stat. 477), (24) (40 Stat. 272); Sec. 6 (10) (36 Stat. 539); Sec. 16 (8) (34 Stat. 584); Sec. 20 (6),

(7) (24 Stat. 379; 34 Stat. 584; 41 Stat. 493); Sec. 20a (11) (41 Stat. 494); Sec. 26 (41 Stat. 498).

Sec. 1 (17):

> "* * * and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense, and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Sec. 1 (24):

> "And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad or water or otherwise to obey strictly and conform promptly to such orders, and failure knowingly and willfully to comply therewith, or to do or perform whatever is necessary to the prompt execution of such order, shall render such officers, agents, or employees guilty of a misdemeanor, and any such officer, agent or employee shall upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both, in the discretion of the court."

The foregoing penalty was imposed for the violation of any preference or priority order of the President, made, during the late World War, either by

him directly or through the Commission or some other agency.

Sec. 16 (8):

> "Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of $5,000 for each offense."

3. EXCEPT AS THE THING IS ONLY OFFERED OR SOLICITED THE ELKINS ACTS FORBIDS ONLY COLLUSIVE DEALINGS BETWEEN CARRIER AND SHIPPER AS TO TARIFF RATES, RULES, PRACTICES AND REGULATIONS.

(a) The word "Device" (Section 1) does not qualify the second "whereby" clause, but relates only to published rates.

Counsel for the Government, in their analysis of the Elkins Act (Brief, pp. 21-23), italicize the phrase "*by any device whatever,*" seeking, we assume, to make it qualify the clause prohibiting the giving of "any other advantage" or the practicing of any "other discrimination." The Government's case admittedly must rise or fall upon the Elkins Act (Brief p. 44), and also, apparently, upon a strained construction of that phrase found in the Act. The language and the sense of the second "whereby" clause, we contend cannot be so distorted. Each clause is separate and distinct in itself. The very structure of the sentence

disproves any other claim. It is unlawful for any person to offer, grant or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of property, (1) "*whereby* any such property shall by any device whatever be transported at a less rate than that named in the tariff published and filed by the carrier," etc.; (2) "*or whereby* any other advantage is given or discrimination is practiced." (Italics ours.) Congress had previous to the enactment of the Elkins Act employed the word "device" in legislation relating to common carriers. See section 10 of the Interstate Commerce Act. There the word, in each instance, is used to describe the means employed to secure transportation at less than the published rate. The word is again used in the same sense in the last paragraph of section one of the Elkins Act. Neither act knows any device employed to obtain in the physical act of transportation, unassociated with the rate charged for the service.

We are not unmindful of the definition assigned to the word by the Court in *Armour Packing Company v. United States,* 209 U. S. 56, 71, but the decision there was addressed to a violation of the first "whereby" clause, and the Court in *Lehigh Coal & Navigation Co. v. United States,* 250 U. S. 556, said that the language of the Armour case is easily explained by the question that was presented for decision, it being addressed to the question of fraudulent conduct and its selection and adequacy are therefore manifest.

The Government does not, and indeed it cannot contend that a shipper is to go unpunished, who, through device, artifice or fraud practiced upon a carrier and without its knowledge or consent, obtains transportation at less than the published rates, Section 10 of the Commerce Act covers such an offense. But there Congress was specific. If one knowingly and wilfully pays less than the published rate, through the use of any named device, "whether with or without the consent or connivance of the carrier," etc., he shall be deemed guilty of a fraud.

The lower court therefore rightly takes section 10 into view in arriving at the intention of Congress in the passage of the Elkins Act.

Tariff rates are not here involved. The defendant was indicted because of its bare act in securing transportation, when such service was presumed to be denied to it by an order of the Commission. And why did Congress prohibit the securing, through any *device* or means, of a *rate* lower than the published rate and yet fail to prohibit the securing of *transportation* through similar methods or instrumentalities?

Interstate Commerce Commission v. B. & O. R. R., 145 U. S. 263, 275, 276:

> "Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which

demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable.

* * * * *

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."

The Act to Regulate Commerce was not intended to restrict, but was in aid of transportation. In enacting the statutes establishing the Interstate Commerce Commission, the purpose of Congress was to facilitate and promote commerce. *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 198. Only with the passage of the Transportation Act of 1920 did Congress see fit by legislative enactment to impose limitations upon and to permit preferences and priorities in the transportation of property. At common law and under the original act to regulate commerce, "in case of car shortage occasioned by unexpected demands," the carriers were "bound to treat shippers fairly, if not identically." *Penna. R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 133. And while the opinion in the case goes on to say that, in deter-

mining how the inadequate supply shall be distributed, *it might be necessary* to consider the character of the freight tendered, there was up to the time of the promulgation of the Commission's service orders, no legally prescribed or recognized standard for the distribution of facilities. In saying this we have not overlooked or disregarded the case of *United States v. Metropolitan Lumber Co.*, 254 Fed. Rep. 335.

(b) Under the express language of the Act where granting or giving, accepting or receiving is charged, there must be a co-transgressor.

Section 1 creates three separate and distinct correlative offenses on the part each of the carrier and shipper: (1) The offering or soliciting of a rebate, concession or discrimination; (2) The granting or accepting of a rebate, concession or discrimination; and (3) The giving or receiving of a rebate, concession or discrimination. *United States v. Bunch*, 165 Fed. Rep. 736.

Counsel's discussion of the conjunctive "and" and disjunctive "or" in order to come to the thing Congress had in mind, is hardly persuasive. We do not argue for a reading of the correlative phrases as if the word "and" should replace "or." Such a substitution would give an absurd effect to the section. Supply "and" and, in the language of the statute, a carrier must not only "offer" but also "solicit," not only "grant," but "accept"; not only "give," but "receive" the same thing prohibited. Likewise, with a shipper. Nor do we ask for "verbal nicety"

but we simply ask for that sense of the words which best harmonizes with the context of the Act.

There may be a crime if the rebate, concession or discrimination is offered, although not solicited, and the inhibited favor may be solicited but not offered and yet the crime is complete. Such offenses may be solicited and offered, and both the shipper and carrier would be held. But the elements of a crime are not present where only acceptance or receipt is charged. To complete either as an offense, there must be a granting or giving. There must be a co-transgressor, from whom the rebate, concession or discrimination springs.

A case under the act is not made out, in fact, a sufficient one is negatived, by the allegation that the concession was "obtained by deception practiced" by the defendant upon the carriers "whereby an advantage was given by those carriers * * *
and which said common carriers, but for said deceptive billing, device and deception, would not have granted defendant" (Paragraph 6 of count 1 of the indictment, R. 8).

Such an averment attempts to read into the law something not found there, stated either expressly or by fair implication. Concession implies a prior demand. A "concession" is what the shipper solicits, accepts or receives. How does the act specifically define or qualify the term? It is a thing "whereby any other advantage is given or discrimination is practiced." Directly and expressly, as a statutory

thing, an *advantage* is not something *accepted* or *received*. It is something "*given*." Only by implication is it a thing *accepted* or *received*, made so because it is *given*. An advantage is unlawful only as it qualifies and characterizes a rebate, concession or discrimination. Those are the direct, express things which the shipper must not have. Webster's *New International Dictionary* says a concession is: "1. Act of conceding or yielding; usually implying a demand, claim, or request, and thus distinguished from *giving*, which is voluntary or spontaneous"; and "3. A thing yielded; an acknowledgment or admission; a boon; a grant; esp., a grant by government or other authority of land, property, or a privilege or right to do something; as, a *concession* to build a canal." The legislature in qualifying and coloring the word concession with the phrase "whereby any other advantage *is given* or *discrimination* is practiced," still preserves Webster's meaning. The concession may result in a giving, but it starts with a demand. In other words, when there is a concession, there is first the request by one party, then the yielding, which results in the giving by the other party. The concession is therefore bilateral. If a concession is obtained or received, it must also be yielded or given. It is also clear that the words offer, grant or give, and solicit, accept or receive are correlative in meaning. Is it not fair, then, to say that if it were intended to make criminal the *taking* of an advantage apart from its being *given*, the statute could have made it plain that such was its meaning?

The Elkins Act makes no mention of *deception* or *deceptive billing*. Those terms have been imported. By the use of them a case under the act is not made out. Consciously or unconsciously, the pleader has drawn from section 10 (3) of the Interstate Commerce Act (36 Stat. 539), which, of course, can have no application here. False or deceptive billing is made punishable, by that section, only as it obtains or attemps to obtain transportation of property at less than the regular rates printed, published and filed. Securing transportation without any effect upon published rates, is not within the prohibition of the section.

4. THE DECISIONS OF THIS COURT DO NOT SUPPORT THE CONTENTION OF THE GOVERNMENT THAT THE TAKING OF A "CONCESSION" OR AN "ADVANTAGE" BY A SHIPPER, THERE BEING NO COLLUSION ON THE PART OF THE CARRIER, IS A CRIME, PUNISHABLE BY THE ACT.

The Government is not as helpless as counsel are pleased to picture it. (Brief pp. 28 *et seq.)* The carrier, as we have previously pointed out, must print, publish and file its tariffs. If it wilfully fails to do so, or if it fails strictly to observe such tariffs so filed, it is guilty of a misdemeanor. (Section 1, Elkins Act.) A wrongful and conspiring act on the part of the shipper is not necessary to complete the crime thereby committed by the carrier. Under such a state of the law, how can it be argued that there is a "double burden" upon the Government? Why does it become necessary to prove a conspiracy? Nor can it be con-

tended that a conspiracy must be shown if the carrier unlawfully commits any of the other acts recited. Section 10 (1) of the Commerce Act again fixes the punishment.

Without, in the slightest degree, contending for a narrow construction, we can further answer the plaintiff in error by saying Congress meant only what it said, and it is not for the prosecuting arm of the Government to seek to extend that body's express enactment to cover conduct not within the legislative mind.

To assume within the field of morals the worst possible aspect of the charge, is it any more wrongul to misbill property, to secure a lower rate, than it is by an imposition to obtain transportation when such service is deemed to be denied? Yet Congress has plainly provided that misbilling does not require the consent or connivance of the carrier to establish the crime, and the law under which the Government has called the defendant in error to book says not a word about lack of consent or connivance. Was such an omission intentional or was it an oversight by Congress? The plaintiff in error would apparently strike from the misbilling statute (Section 10 (3) of the Interstate Commerce Act) the phrase "without the consent or connivance of the carrier," and not be disturbed one whit by the outcome.

Counsel (Brief p. 30) state three instances where common carriers cannot function, if the lower court is upheld. Instance (a) is the case at bar.

We fear it is somewhat overstating the case to say under (b) that for information as to car ratings, the carrier is dependent upon the mine or shipper. Has not the carrier its own source of information? Does it not know how many cars it has supplied the affiant in the past?

The embargoes discussed under (c) may not be legal. Indeed, there has for a great many years been serious doubt among carriers as to the legality of their embargoes. See *Menasha Paper Co. v. Chicago & Northwestern Railway Company*, 241 U. S. 55, 59.

The case of *Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657, 671, was a civil case, and the excerpt quoted therefrom (Brief, p. 31) appears to be an inadvertence in reference by the Court. To misbill property is expressly cognizable under section 10 (3) of the Interstate Commerce Act. Harriman, the Court said, made an undervaluation of his property which had the effect of securing the lower of two published rates. The Government has uniformly, as to such cases, insofar as they are reported, resorted for prosecution to section 10 (3) of the Interstate Commerce Act.

United States v. Metropolitan Lumber Co., 254 Fed. Rep. 335, 344:

> "While the remarks of Mr. Justice Lurton in *Mo., Kan. & Tex. Ry. Co. v. Harriman*, 227 U. S. 657, 671, 33 Sup. Ct. 397, 57 L. Ed. 690 (second paragraph), are susceptible of the inference which the government seeks to draw

from them, and, if interpreted in that light, would fully support the views here expressed, I am not, owing to the facts of that case, sufficiently persuaded that they may be properly considered as an expression of an opinion of the Supreme Court on the point in question. I incline to the belief that the court had reference rather to the fact that the acts therein referred to produced a discrimination which the Elkins Act prohibited, rather than that such acts were necessarily criminal under that statute."

United States v. Union Mfg. Co., 240 U. S. 605, 611:

"In denouncing as criminal 'false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or other device or means' employed in order to 'obtain or attempt to obtain transportation for such property at less than the regular rates then established,' the lawmaker regarded not merely the physical transportation of the property, but the entire transaction through which consignor or consignee might seek to evade the policy of the Act to subject all interstate shipments to uniform rates of charge prescribed in published tariffs."

See also:

United States v. Sterling Salt Co., 200 Fed. Rep. 593.

United States v. Vacuum Oil Co., 153 Fed. Rep. 598, proves nothing except what is readily admitted,—that

it is a *concession* for a shipper knowingly to pay less than the published rate, when the assessment is knowingly made by a carrier. That both the shipper and carrier participated in the wrongful act, is made clear by the companion case of *United States v. Pennsylvania R. R. Co.*, 153 Fed. Rep. 625. The language of the *Oil Company* case necessarily takes only that situation into view.

Likewise, the offenses charged against the defendant in *United States v. Hocking Valley Ry. Co.*, 194 Fed. Rep. 234, were participated in by the shipper. See *United States v. Sunday Creek Co.*, 194 Fed. Rep. 252. It is hard to see how the language from any case of conscious, joint participation can serve to maintain the proposition announced at the outset (Brief, p. 27), that concerted or collusive action of shipper and carrier are unnecessary.

The case of *United States v. Metropolitan Lumber Co.*, 254 Fed. Rep. 335, is the Government's chief reliance insofar as the decided cases go. Knowledge or connivance on the part of the carrier is held not to be essential. The court speaks (page 343) of the purpose which Congress had in mind in passing the Elkins Act. That intention, we have unquestionably shown, was simply to make criminal all collusive dealings between carrier and shipper; not primarily, as the court holds, to punish the beneficiary of "*favoritism and inequality of treatment.*"

We here use the exact language which the court used and in the sense meant, but the phraseology is not apt. "Favoritism" connotes one from whom a

favor consciously springs; "inequality of treatment" one who knowingly treats.

It is said that to limit the operation of the act only to such transactions as are consciously participated in by *both the shipper and carrier* would free *both the carrier and shipper* from criminal responsibility in all cases where the *shipper* could, without the knowledge of the *carrier*, secure advantage and discriminations in transportation service by means not violative of section 10 of the Interstate Commerce Act and the Act of June 18, 1910. (Ch. 309, Sec. 10, 36 Stat. 539.)

The Elkins Act is based on knowledge of the wrongful transaction. It does not require the construction which the court deprecates for the carrier to be absolved. The carrier concerned in the case before that court was not, so far as appears, found guilty. Would there have been a conviction of the carrier, then, if the contention of defendant had been upheld?

B. DEFENDANT IN ERROR DID NOT OBTAIN A DISCRIMINATION, CONCESSION OR ADVANTAGE IN TRANSPORTATION. THE COMMISSION'S SERVICE ORDER No. 23, PARAGRAPH 7 (GOVERNMENT'S BRIEF, P. 47) PRESCRIBED "CLASSES OF PURPOSES" AND "ORDER OF CLASSES" ONLY WITH RESPECT TO CAR SERVICE. THE COMMISSION HAD NO DELEGATED POWER AT THE TIMES ALLEGED, TO FIX PREFERENCES AND PRIORITIES IN CAR SERVICE.

Counsel say (Brief, p. 17) that all questions of constitutional law and lack of power in the Commission have been foreclosed by the decision of this Court in the *Avent Case*, 266 U. S. 127. But our demurrer, as

we at the outset stated, raises objections not of such a nature, and yet, in addition to the application of the Elkins Act.

Paragraph 1 of Service Order No. 23 (Government's Brief, p. 45 *et seq.)* directs the carriers to give preference, and priority in movement, among other things, to coal, not according to any preferred uses or purposes, but generally and only as a commodity.

> "That each such common carrier by railroad, to the extent that it is currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, shall give preference and priority to the movement of each of the following commodities: food for human consumption, feed for live stock, live stock, perishable products, *coal,* coke and fuel oil." (Italics ours).

Section 7 provides:

> "That in the supply of cars to mines upon the lines of any coal-loading carrier, such carrier is hereby authorized and directed, to place, furnish and assign such coal mines with cars suitable for the loading and transportation of coal in succession as may be required for the following classes of purposes, and in following order of classes, namely:" etc.

The directions given and the restrictions attempted to be imposed by paragraph 7 relate only to car service, to the placing, furnishing and assigning of cars which are suitable for the loading and transportation

of coal. The mere qualifying use of the phrase "transportation of coal" is not the equivalent of a summary direction or requirement that transportation be undertaken and accomplished.

Peoria & Pekin Union Railway Company v. United States, 263 U. S. 528, 532:

> "The Commission possessed no emergency power prior to the so-called Esch Car Service Act, May 29, 1917, c. 23, 40 Stat. 101. Its provisions were amended by Transportation Act 1920; and in the amended form are introduced as paragraphs 15 and 16 of s. 1 of the Act to Regulate Commerce and as paragraphs 4 of s. 15. 41 Stat. 476-7, 486. Paragraph 15 deals in sub-paragraphs (a) and (b) with car service; in sub-paragraph (c) with the common use of terminals; in sub-paragraph (d) with preferences in transportation, embargoes, and movement of traffic under permits. Paragraph 16 and the amndment to s. 15 confer emergency power to re-route traffic and to 'establish temporarily such through routes as in its (the Commission's) opinion are necessary or desirable in the public interest.' None of these provisions grants in terms power to require the performance of a transportation service. The specific grant in paragraph 16 of emergency power to 'make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines or roads,' and the omission of any reference to switching, tend to rebut an intention to grant the power here asserted. The order can-

not be justified as dealing with preferences in transportation or embargoes under sub-paragraph (d). Nor does the order provide for the joint use of terminals under sub-paragraph (c); since it does not purport to authorize the Minneapolis & St. Louis to use the tracks and terminals of the Peoria Company. The contentions mainly urged are that the order is one concerning car service under sub-paragraph (b); or that power to require switching should be held to have been granted by implication.

The argument that the authority of the Commission over car service should be construed to include the requiring of switching rests upon paragraph 10 of amended S. 1 of the Act to Regulate Commerce. But 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of sub-paragraphs a, b and c. It is to this end only, that provision is made by paragraph 10 for the 'movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property.' This is substantially the same expression as was used in the Esch Car Service Act. The 1920 Act merely adds locomotives and other vehicles.

Transportation Act 1920 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty

> of preventing interruptions in traffic. *But there is no general grant of emergency power to that end; and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication.* Moreover, switching service differs in character from those as to which such power is expressly granted. These involve either the use by one carrier of property of another or the direction of the manner and the means by which the service of transportation shall be performed. The switching order here in question compels performance of the primary duty to receive and transport cars of a connection carrier." (Italics ours.)

There is no averment in the indictment that the rules, regulations or practices prescribed by the service order were printed by the carriers, filed with the Commission and posted to the public. We can assume that such was not done, and that there was no requirement by the Commission that it should be done. The directions of the Commission, then, must have been addressed solely to the carriers, and having been so addressed, there could be no departure from or violation of them by defendant. In view of this situation, no concession, advantage or discrimination was received by defendant.

"Preference or priority in transportation" assumes that the cars are awaiting movement, after having been distributed and loaded,—in what manner Congress has not indicated or left the determination thereof to the Commission, except that the carriers

and the Commission are charged with the duty of seeing that the distribution is just and reasonable. The Emergency Fuel Act (Act of September 22, 1922, c. 413, 42 Stat. 1025) operative during an express period after the transactions in question and for the avowed purpose of amending paragraph 15 of section 1, of the Interstate Commerce Act, provided that the powers of the Commission were thereby "enlarged to include the authority to issue in transportation of coal or other fuel *orders for priorities in car service, embargoes,*" etc. (italics ous).

The penalty provided by paragraph (17) of section 1 for failure to observe the orders and directions of the Commission, is upon the carrier only. This unquestionably shows the legislative intention. We have herein before adverted to the penalties provided for by section 10 of the Commerce Act, and how, in the beginning, the prohibitions against false billing were addressed to the carrier alone, and how, later, the shipper was made subject to similar provisions. A like growth in legislative enactment appears from a consideration of the Emergency Fuel Act. There, for such things as were here done, a penalty was expressly declared against the shipper.

CONCLUSION

Defendant in error has shown that the Commission's service order is not a tariff or schedule within the contemplation of the Elkins Act; that if it was designed to fix a standard of service, publication and

filing by the carriers were necessary; that, no matter how morally wrong it might have been to practice the deception charged, no offense was committed under the Elkins Act; that the Court will not strain language, in order to create an offense, "based chiefly upon a consideration of the mischief which the legislature sought to remedy"; that the Commission's service order called for the "preference and priority" of coal in *transportation* only as a commodity; and that whereas "classes of purposes" and "order of classes" were established only as to *car service,* defendant in error has been indicted for securing in *transportation* a higher class of purposes and order of classes than the service regulation permitted him to have; and that the Commission had no power to fix "preferences and priorities" in *car service* until the passage of the Emergency Fuel Act.

For these reasons, defendant in error submits the judgment of the District Court should be affirmed.

HAL H. SMITH,
Attorney for Defendant in Error, Michigan Portland Cement Company.

THOMAS B. MOORE,
Of Counsel.
March 3, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 216.—October Term, 1925.

The United States of America, Plaintiff in Error, *vs.* The P. Koenig Coal Company.	In Error to the District Court of the United States for the Eastern District of Michigan.

[April 12, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The P. Koenig Coal Company was indicted in the District Court for the Eastern District of Michigan, under the Elkins Act, for knowingly receiving as a shipper concessions from a carrier under the Interstate Commerce Act in respect to transportation of property in interstate commerce obtained by deceitful representation made to the carriers on which the carriers innocently and in good faith relied. The District Court sustained a demurrer to the indictment, and the United States prosecutes a writ of error under the Criminal Appeals Act (Judicial Code, sec. 238, par. 2, as reenacted by the Act of February 13, 1925, 43 Stat. 938, c. 229), which provides that a writ of error from the District Court may be taken directly to this Court from a judgment sustaining a demurrer to any indictment or any count thereof where such judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

The District Court held that section 1 of the Elkins Act of February 9, 1903, c. 708, 32 Stat. 847 (re-enacted in section 2 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 587), under which the indictment was found, applies only to a shipper who knowingly receives a concession from a carrier when such concession is knowingly granted by the carrier in equal guilt with the shipper. *United States* v. *The P. Koenig Coal Company,* 1 Fed. (2d) 738.

The Koenig Coal Company is a Michigan corporation doing business in Detroit. The defendant was indicted on eighteen counts applying respectively to eighteen carloads of coal. The shipments originated in West Virginia, and were moved to Detroit in August,

1922, over the Chesapeake & Ohio Railroad Company as the initial carrier for each car.

On July 25, 1922, the Interstate Commerce Commission, acting under the Transportation Act of February 28, 1920 (c. 91, Title 4, sec. 402, (15), 41 Stat. 456, 476), issued its service order No. 23. Section 15 gives the Commission, when shortage of equipment, congestion of traffic or other emergency requires action in any section of the country, authority to suspend its rules as to car service, and to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people, and to give direction for performance or priority in transportation or movement of traffic. Service Order No. 23 declared that there was an emergency upon the railroad lines east of the Mississippi River, and directed that coal cars should be furnished to the mines according to a certain order of purposes, numbered in classes 1, 2, 3, 4 and 5, and that no coal embraced in classes 1, 2, 3 and 4 should be subject to reconsignment, or diversion except for some purpose in the same or a superior class. The order required that the carriers should give preference and priority in the placement and assignment of cars for the loading of coal to those required for the current use of hospitals which were placed in class 2, in priority to cars for the loading of coal required for the manufacture of automobiles or automobile parts, which were placed in class 5 and later in class 3. The order remained in force from July 25 to September 20, 1922. The first count of the indictment charged that the defendant intending to obtain a preference and priority in transportation, which it was not then lawfully entitled to receive, and to procure the coal for the use of Dodge & Company engaged in the manufacture of automobiles and parts thereof, sent a telegraphic order to the Monitor Coal & Coke Company of Huntington, West Virginia, asking the shipment of carloads of coal to the Koenig Coal Company at Detroit for the use of the Samaritan Hospital, that it thereby secured the furnishing by the C. & O. Company on August 5, 1922, at the request of the Monitor Company, of one car suitable for the loading and transportation of coal on its line in West Virginia, which was billed and consigned in accordance with the telegraphic order; that when it reached Detroit, the defendant diverted the car to Dodge Brothers who used the coal, the Samaritan Hospital not needing or requiring the coal, and not having authorized or requested the defendant to send the order; that the

concession and discrimination was thus obtained by a deceitful device of which the carriers had no knowledge. The other seventeen counts are similar and refer to different cars of coal, some of them to different mines and consignors and some to different beneficiaries of the trick as actual consumers of the coal.

The demurrer challenged the indictment on various grounds, 1st, that the facts charged did not constitute a concession given or a discrimination practiced as defined by the Elkins Act; 2nd, that the restrictions imposed by the Interstate Commerce Commission's Service Order No. 23 were beyond the power of the Interstate Commerce Commission in that they were an exercise of purely legislative power which could not be delegated; 3rd, that the service order exceeded the authority conferred upon the Interstate Commerce Commission; 4th, in that it was beyond the power of the Federal Government thus to affect the use, consumption, price and disposition of coal in what was the exercise of a local police power reserved to the States; 5th, that the order is so arbitrary and unreasonable as not to be within the power of the National Government and to be an encroachment on the powers of the several States; 6th, that the service order violated the Fifth Amendment in depriving defendant of liberty and property without due process of law, and, 7th, that it was invalid because it gave preference to the Lake Erie ports of Ohio and Pennsylvania over the ports of other States in respect to the transportation and shipment of coal.

All of these objections, except the first and third, are covered by the decision of this Court in *Avent* v. *United States,* 266 U. S. 127, where we held that Congress might consistently with the Fifth Amendment require a preference in the order of purposes for which coal might be carried in interstate commerce, that it did not trench upon the power reserved to the States, that the power might be delegated to the Interstate Commerce Commission for exercise under rules that were reasonable and in the interests of the public and of commerce, that the violation of such rules might be made a crime, and that the objection that the order unconstitutionally preferred the ports of one State over those of another could not avail a party whom the alleged preference did not concern.

Counsel for the defendant in his brief and argument supports the demurrer solely upon the same ground upon which the District Court sustained it, namely that the offense under which the indictment is drawn can not be committed without the guilty knowl-

edge and collusion of both the shipper and the carrier. The relevant part of section one of the Elkins Act reads as follows:

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant or give or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000, nor more than $20,000."

This makes it unlawful for anyone to receive any concession in respect of transportation of any property in interstate commerce by a common carrier whereby any advantage is given or any discrimination is practiced. The facts charged bring what was done exactly within this description. It was a priority or preference in securing the transportation of coal in an emergent congestion of the traffic. It was certainly a concession and one of value to one who under the law or the regulations having the force of law could not secure that priority. The words advantage, concession and discrimination in the statute must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination. It certainly was not the intention of Congress to punish the granting or receiving of a lawful concession, a lawful advantage or a lawful discrimination. It is asked, if this was a concession, by whom was it conceded? The answer is by the carrier. He granted the priority and therefore he made the concession and gave the advantage and practiced the discrimination. But it was unlawful and he did not know the facts which made it so. The shipper knew them because he had secured it by his deceit and received it. What is there in the statute that releases him from guilt, because the carrier who yielded to him the concession and gave him the advantage and made the discrimination thought it was lawful?

Reference is made to the debates in Congress and to decisions of this Court to show that in the minds of the legislators in enacting the Elkins Act, the discrimination and inequality they sought to

prevent had in the past arisen chiefly from collusion between the carrier and the shipper. As practical men of course they knew that this was the way in which violations of the law were most likely to occur. But this does not at all justify the conclusion that Congress in enacting the Elkins law intended to limit the offenses described in it to cases of collusion, if otherwise the acts charged came within the words of the statute.

We have often declared that the purpose of Congress in the Elkins law was to cut up by the roots every form of discrimination, favoritism and inequality. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72; *United States* v. *The Union Stock Yards*, 226 U. S. 286, 309. It would be contrary, therefore, to the general intent of the law to restrain the effect of the language used so as not to include acts exactly described when they clearly effect discrimination and inequality. Certainly no one would say that a shipper might not be convicted under the act of soliciting an unlawful concession or advantage or discrimination even though the carrier refused to extend it to him. So, too, if a carrier offers an unlawful advantage to a shipper who declines it, clearly the carrier may be indicted and punished. Collusion is not necessary in such a case. Why in this? The act is plainly not confined to joint crimes. The general rule that criminal statutes are to be strictly construed has no application when the general purpose of the legislature is manifest and is subserved by giving the words used in the statute their ordinary meaning and thus covering the acts charged.

In *Dye* v. *United States*, 262 Fed. 6, a defendant in an indictment under the Elkins Act was the agent of a carrier and was in charge of the distribution of cars between coal mines during an emergency and car shortage. By a device, he violated the rule of distribution established by the Commission and secured an excessive number of cars for a particular mine, the operators of which were innocent of the inequality. He did this for his personal profit by sale of the excess. His conviction was sustained by the Circuit Court of Appeals for the Fourth Circuit.

In *Missouri, Kansas & Texas Pacific Ry. Co.* v. *Harriman*, 227 U. S. 657, the Court had to deal with the question whether a shipper who valued his goods for the purpose of obtaining the lower of two published rates based on valuation was in an action for their loss estopped from recovering a greater amount than his

own valuation, the carrier having no knowledge of the value of the shipment. It was held that he was estopped. In reaching this conclusion, Mr. Justice Lurton, speaking for the Court, at page 671, said:

"If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708)."

It is true that this was said *arguendo*, but it has persuasive weight and now that the point is before us for judgment we reaffirm it. Compare also *Illinois Central Railroad Co.* v. *Messina*, 240 U. S. 395, 397.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1925.

The United States, Plaintiff in Error, *vs.* Michigan Portland Cement Company.	In error to the District Court of the United States for the Eastern District of Michigan.

[April 12, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This case on its facts is similar to that of the *United States* v. *The P. Koenig Coal Company,* just decided. The indictment against the Cement Company embraces fifteen counts, and each court shows that the Cement Company, with the assistance of the Bewley Darst Coal Company, while Service Order No. 23 of the Interstate Commerce Commission was in force, obtained a billing and consignment of cars of coal by the Louisville & Nashville Railroad Company from a mine in Kentucky to the Municipal Light and Power Company at Four Mile Lake in Michigan where the coal was delivered in accordance with direction and was appropriated by the Cement Company for its use; that the billing and the preference were granted by the carrier company on the assumption that the coal was to be delivered and used by a public utility company which was in class No. 2 under Order No. 23, instead of class No. 5 in which coal for making cement was embraced. The District Court sustained the demurrer to this indictment on the same ground as in the *Koenig* case, that the Elkins Act requires the collusion of the carrier with the shipper and the carrier's conscious violation of law in the concession granted, and that when this is negatived in the indictment, the indictment must fail. That ground we have held to be without weight in the *Koenig* case. It was the only one pressed on us.

In this case the counsel for the defendant advances in his brief and argument two other grounds raised by the demurrer on which he contends the indictment should have been held bad. One of them is that section 1 of the Elkins Act, under which the indictment is found, must be limited to a concession or discrimination

which violates a tariff published and filed by a carrier, that as a rebate without such tariff is not unlawful within that section, so a concession or discrimination is not. The contention is that the published tariff should have indicated that the order of distribution of cars should be as Order 23 requires.

The Elkins Act does not require such a tariff as to any other advantage or discrimination than a rebate. It declares to be an offense any device whereby transportation shall be given at any less rate than named in the published tariff "or whereby any other advantage is given or discrimination is practiced." Where the offense consists in a rebate, as that term is usually understood, to-wit, transportation at a less rate in dollars and cents than the published rate which the shipping public are charged, a published tariff is of course necessary to constitute the standard, departure from which is the crime. Where there is no pecuniary reduction of the rates as published, and the tariff is complied with but the law against favoritism and discrimination is infringed by the making of a concession or the granting of an advantage not specifically measured in dollars and cents, reference to a published tariff is unnecessary. There is nothing in the statute that indicates the necessity of a published tariff which should expressly recite the fact that no unfair or unequal concession or advantage in the distribution of coal cars to shippers, or in the priority of their shipment, should be afforded. The fact that the advantage or discrimination is unlawful is plain from the description of its character, as shown in this indictment without reference to the rates fixed in the tariff. See *Lambert Run Coal Co.* v. *B. & O. R. R.*, 258 U. S. 377, 378. Such a published tariff seems not to have been present in *C. C. C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849, and in *Central of Georgia Ry.* v. *Blount*, 238 Fed. 292, in which leases of property by carriers to shippers at inadequate rentals were held to be unlawful concessions. Nor in *Vandalia Railway* v. *United States*, 226 Fed. 713, where a loan by a carrier to shipping interests at less than market rate, was held to be an unlawful concession. Nor in *Northern Central Railway* v. *United States*, 241 Fed. 25, where the waiving of royalties for the use of coal lands leased to shipping interests was held to be an unlawful concession. Nor in *Dye* v. *United States*, 262 Fed. 6, in which the agent of a railway company who secured an excessive number of cars for one of a great number of mines between which, by order of the Interstate Commerce Commission, in an emergency, cars were to be distributed accord-

ing to a rule, was convicted under the Elkins Act, and the Fourth Circuit Court of Appeals sustained the conviction.

Service Order No. 23 herein was issued under the Transportation Act and had the force of law. *Avent* v. *United States*, 266 U. S. 127, 131; *United States* v. *Grimaud*, 220 U. S. 506. In the absence of a specific requirement for its publication in a tariff either in the act authorizing the service order, or in the Elkins Act, we can find no reason for making it essential in the enforcement of the statute and no case is cited to suggest one.

The other ground urged by counsel for the defendant is, if we understand it, that paragraph 15 of section 402 of the Transportation Act did not authorize and delegate to the Interstate Commerce Commission the fixing of preference and priorities in transportation, that paragraph 7 of the Commission's order prescribed classes of purposes and order of classes only with respect to car service, and made no rule applicable to the transportation of coal for different classes of purposes and different order of classes, that car service does not include transportation, and that the defendant here is indicted for securing a concession in transportation by which he obtained an improper class under a classification which the Commission therefore had no authority to make and which it did not in fact require. We think the argument does not give proper effect to paragraph 15 and the words and significance of the service order. By paragraph 15 the Commission is authorized, 1st, to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission; 2nd, to make such just and reasonable directions with respect to car service without regard to the ownership as between the carriers of cars, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, and, 3rd, to give directions for preference or priority in transportation, embargoes, or movement of traffic under permit and for such periods as it may determine, and to modify, change, suspend or annul them. The service order, after reciting the emergency, directs each common carrier east of the Mississippi River to the extent to which it is unable promptly to transport all freight traffic, to give preference and priority to coal, to give preference and priority to the movement, exchange and return of empty coal cars, to furnish coal mines with certain classes of cars, to require that non-coal loading carriers deliver empty coal cars to the maximum ability of each, to enable the connecting coal loading companies

to receive and use the coal cars so delivered for the preferential purposes set forth in the order; to discontinue the use of coal cars for the transportation of commodities other than coal during the order, to place an embargo on the receipt by any consignee of coal in suitable cars who shall fail or refuse to unload the coal seasonably; and finally in the supply of cars to mines to place, furnish and assign coal mines with cars suitable for the loading and transportation of coal for certain classes of consignees, and in a certain order, forbidding reconsignment or diversion. It seems to us clear that the order of the Commission affects the furnishing of cars, their loading, their consignment and thus necessarily their movement in transportation and corresponds fully with the powers conferred by section 15; and that section 15 and Service Order No. 23 both apply not only to priority of car service but also to that of transportation. Certainly one who secures reconsignment and diversion from a lower to a higher class of consignees for delivery violates the service order in terms.

In urging this objection to the indictment, reliance is had by defendant upon the opinion of this Court in the case of *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528. There the Interstate Commerce Commission sought under section 1 to compel a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for another connecting carrier. It was held that the exercise of the emergency power of the Commission in transferring car equipment from one carrier to the use of another under paragraph 15 was strictly to be construed, and that the provision as to car service did not authorize the Commission to impose upon the terminal carrier, without a hearing, the affirmative duty not only of turning over its cars and equipment to another carrier, as contemplated in paragraph 15, but also that of itself doing the work of the transportation of and for another carrier. It was in this connection that this Court used the expression that car service connotes the use to which vehicles of transportation are put, but not the transportation service rendered by means of them. The opinion expressly affirms the authority of the Commission under paragraph 15 to give regulatory directions for preference or priority in transportation. The language of this Court in the *Peoria* case referred to is of no aid to the defendant here.

The judgment is

Reversed.